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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

v.

HENRY INGRAM, JAMES BRITT, WILLIAM MOODY, and ROY T. FLOYD, individually and on behalf of all persons similarly situated,

and

SHELLY L. ANDERSON, JAMES L. PERRY, individually and on behalf of all others similarly situated,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

Opinions of the Courts

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 308—August Term, 1982

(Argued November 15, 1982 Decided June 13, 1983)

Docket No. 82-7384

HENRY INGRAM, JAMES BRITT, WILLIAM MOODY, and ROY T. FLOYD, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellees,

—and—

FRANCES WILLIAMS, EDWARD MILON, HORACE MITCHELL, HERBERT BRUTON, JOVINO GARCIA,

Intervenors,

—v.—

MADISON SQUARE GARDEN CENTER, INC., MADISON SQUARE GARDEN CORPORATION, ALLIED MAINTENANCE CORPORATION and ALLIED PUBLIC EVENTS SERVICE CORPORATION,

Defendants,

—and—

LOCAL UNION NO. 3, IBEW, AFL-CIO,

Defendant-Appellant.

SHELLY L. ANDERSON, JAMES L. PERRY, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

—and—

MADISON SQUARE GARDEN CENTER, INC., MADISON SQUARE GARDEN CORPORATION, ALLIED MAINTENANCE CORPORATION, ALLIED PUBLIC EVENTS SERVICE CORPORATION, LOCAL 54, SERVICE EMPLOYEES INTERNATIONAL UNION,

Defendants,

—and—

LOCAL UNION NO. 3, IBEW, AFL-CIO,

Defendant-Appellant.

Before:

VAN GRAAFEILAND, MESKILL and PRATT,

Circuit Judges.

Union appeals from a judgment of the United States District Court for the Southern District of New York (Sand, J.), awarding back pay, retroactive seniority rights, and attorneys' fees and costs to plaintiff classes in an employment discrimination suit.

Affirmed as modified.

NORMAN ROTHFELD, New York, N.Y., *for Defendant-Appellant.*

LEWIS TESSER, New York, N.Y., *for Plaintiffs-Appellees.*

VAN GRAAFEILAND, *Circuit Judge*:

Local 3 of the International Brotherhood of Electric Workers appeals from a judgment of the United States District Court for the Southern District of New York (Sand, J.) which awarded plaintiffs in a class employment discrimination suit retroactive seniority rights with back pay, front pay, and attorneys' fees, the total monetary award, with interest, being substantially in excess of $1 million. Four opinions written by the district court are reported at 482 F. Supp. 414, 482 F. Supp. 426, 482 F. Supp. 918, and 535 F. Supp. 1082. Although we find the evidence of discrimination somewhat less persuasive than did the district court, we are not prepared to hold that the district court's findings on this issue were clearly erroneous. *See Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Accordingly, we affirm the district court's adjudication of liability. However, for reasons hereafter discussed, we find it necessary to modify the relief which the court below granted.

Since 1965, Local 3 of the International Brotherhood, which has more than 4,300 black and Hispanic members, has represented the "maintenance group of utility men" (hereafter "laborers") at Madison Square Garden. These laborers prepare the Garden for its various featured events. The several contracts between the Union and the

Garden placed no restrictions on the employer's method of hiring, merely requiring that all laborers become members of the Union within 31 days of their employment. However, in practice, the hirelings, of which there was an average of about 5 per year, were referred to the Garden by the Union representative for the Garden laborers. About 1 in 6 of the hirelings was either black or Hispanic.

Until 1969, the Garden also employed other groups of people as cleaners or porters, bowling alley and lavatory attendants, and elevator operators. In 1969, the Garden subcontracted its cleaning work to Allied Maintenance Corporation, retaining only the elevator operators as its own employees. All of the cleaners are represented by Local 54 of Service Employees International Union, and most of them are either black or Hispanic.

On August 13, 1973, appellees Ingram, Britt, Moody, and Floyd, all of whom were porters working at the Garden, filed charges against the Garden and Allied with the Equal Employment Opportunity Commission, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that these employers had discriminated against them and other black porters by paying them less than the white laborers for doing similar work and by maintaining segregated job classifications. The EEOC concluded that the Garden and Allied were violating Title VII, and, on October 4, 1976, following unsuccessful conciliation efforts, issued right-to-sue letters to the four complainants. On December 30, 1976, the porters filed a proposed class action suit against the Garden and Allied, alleging violations of 42 U.S.C. §§ 1981 and 1985 as well as Title VII. On June 22, 1977, Local 3 was added to the litigation by means of an amended complaint, which charged that the Union was discouraging competent minority cleaners from seeking

and obtaining jobs as laborers and was conspiring with the Garden and Allied towards this end by advising cleaners that the Garden was solely responsible for hiring, that no jobs were available, and that cleaners must do apprenticeships before becoming members of Local 3.

On November 24, 1975, appellees Anderson and Perry, black porters who worked at the Garden, also filed discrimination charges with the EEOC, their charges being directed against the Garden, Allied, and Local 3. On January 16, 1978, a right-to-sue letter issued, and on March 31, 1978, a proposed class action complaint on behalf of the Anderson group was filed.

The district court certified a Title VII class and a §§ 1981 and 1985 class in both actions. In the *Ingram* action, the Title VII class, whose claims, of necessity, were limited to the Garden and Allied, consisted of all blacks who, after February 14, 1973, had been or would be employed as cleaners at the Garden. The §§ 1981 and 1985 class consisted of all blacks and Hispanics who, after December 30, 1973, had been or would be employed as cleaners at the Garden. Certification of both classes in *Ingram* was conditioned on the intervention of lavatory and bowling alley attendants and elevator operators as named plaintiffs. Thereafter, Williams, a black lavatory attendant, Milon, a black bowling alley attendant, Mitchell, a black elevator operator, Bruton, a retired black cleaner, and Garcia, an Hispanic cleaner, intervened. The *Anderson* classes were defined in the same manner as those of *Ingram*, except that the Title VII *Anderson* class limitation was May 28, 1975, and the §§ 1981 and 1985 *Anderson* class limitation was March 31, 1975, and both classes claimed against the Garden, Allied, and Local 3.

On July 13, 1978, the *Ingram* and *Anderson* actions were consolidated. On July 16, 1979, the district court

denied the Union's motion to decertify the classes. Subsequently, the plaintiffs entered into a proposed consent decree with the Garden and Allied, in which the defendants agreed, among other things, to pay $117,500 in settlement of plaintiffs' monetary claims plus $47,500 in attorneys' fees. On October 23, 1979, the settlement was approved by the district court, subject only to the submission of an affidavit in support of counsel fees. *See* 482 F. Supp. at 426. In the meantime, the case had proceeded to trial against Local 3, the issue being limited to that of liability.

On October 3, 1979, in an opinion reported at 482 F. Supp. 414, the district court dismissed plaintiffs' § 1985 claims, relying on *Great American Federal Savings & Loan Assoc. v. Novotny*, 442 U.S. 366 (1979), but held the Union liable under both Title VII and § 1981.

Liability

Evidence introduced at trial showed that the percentage of male, non-farm black and Hispanic workers in the Standard Consolidated Area, which includes New York City, Newark, Jersey City, Patterson-Clifton-Passaic, and Middlesex and Somerset Counties in New Jersey, was 25.6%, and, in the Standard Metropolitan Statistical Area, which includes the 5 counties of New York City, Rockland and Westchester Counties in New York, and Bergen County in New Jersey, was 27.4%. It appears from the provisions of the consent decree that both the district court and plaintiffs' attorneys accepted 27% as an appropriate figure. Other evidence before the district court showed that, between 1965 and 1977, Local 3 referred 66 laborers to the Garden and that 10, or 15%, of these were either black or Hispanic. Referrals by the Union of only 7 additional blacks or Hispanics would

have raised its minority referral percentage to approximately 26%. Between 1972 and 1975, the number of laborers employed at the Garden varied between 59 and 71. During 1972 and 1973, 7 of these were black or Hispanic; during 1974 and 1975, 8 were black or Hispanic. Again, an increase of only 7 blacks or Hispanics would have altered the racial composition of Garden laborers so that it approximated that of the general Metropolitan area.

Statistical evidence of discrimination based on but a few numbers is not, standing alone, compelling evidence of wrongdoing. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 621 (1974); *Eubanks v. Pickens-Bond Constr.*, 635 F.2d 1341, 1345-50 (8th Cir. 1980); *Morita v. Southern California Permanente Medical Group*, 541 F.2d 217, 220 (9th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977). In the instant case, for example, the district court observed that one less minority referral by the Union in 1978 would have dropped the percentage of minority referrals from 16% to 14%. 482 F. Supp. at 424 n.24. Nevertheless, the district court drew an inference of discrimination from the "statistical disparity" evidenced by the figures, *id.* n.25, and found that Local 3 "hired [sic] blacks or Hispanics . . . in numbers significantly below their percentage in the labor market surrounding the Garden." 535 F. Supp. at 1094. We do not find as much significance in these figures as did the district court. *See Coble v. Hot Springs School District*, 682 F.2d 721, 734 (8th Cir. 1982); *Williams v. Tallahassee Motors, Inc.*, 607 F.2d 689, 693 (5th Cir. 1979), *cert. denied*, 449 U.S. 858 (1980); Diedrich and Gaus, *Defense of Equal Employment Claims* ¶ 13.11 at 361 (1982). However, the district court did not rely on this evidence alone. It found, among other things, that the efforts of several class

members to secure laborers' positions "were deliberately frustrated by union personnel who, on a number of occasions, either ignored, gave evasive answers to or just generally gave the run-around to class members who sought information from them as to how to become a laborer", and that this " '[got] the message across' and created an atmosphere which discouraged class members from actively seeking a laborer's position." 482 F. Supp. at 421. Although, as the district court itself stated, "the number of these incidents was not great," 482 F. Supp. at 421, the court coupled them with the "statistical disparity" and the "standardless" method of referral to support a finding of discriminatory intent, 535 F. Supp. at 1087. Although we might have reached a different conclusion, we cannot say that the district court clearly erred.

We find no merit in appellant's other challenges to the adjudication of liability. The test for error in class certification is abuse of discretion, *Brick v. CPC Int'l, Inc.*, 547 F.2d 185, 187 (2d Cir. 1976), and there was no abuse in the instant case. The district court applied the correct statute of limitations. *Keyse v. California Texas Oil Corp.*, 590 F.2d 45, 47 (2d Cir. 1978). Appellant's other contentions require no discussion.

The Back Pay Award

In fashioning a remedy for employment discrimination, "the court must, as nearly as possible, 'recreate the conditions and relationships that would have been had there been no' unlawful discrimination." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 372 (1977) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976)). We believe that the remedy in the instant case went beyond that.

The district court referred the factual remedial issues to a Magistrate and instructed the Magistrate to award seniority to every class member who desired a laborer's job as of the date of the next laborer hire that followed his application or "qualifying desire", subject to a maximum date of July 2, 1965. 482 F. Supp. at 923-24. The court instructed the Magistrate to make back pay awards on the same basis, subject to the 2-year limitation period of Title VII and the 3-year limitation period applicable in New York to § 1981. *Id.* at 925-26. The computations, made as directed, produced some interesting results. Two class members were awarded retroactive competitive seniority dates to 1970, a year in which 5 laborers were hired, one of whom was Hispanic. If the district court was recreating the conditions that would have existed had there been no discrimination, presumably he intended that three of the five 1970 hirelings should have been either black or Hispanic. In 1974, 6 laborers were hired, one of whom was black. Nevertheless, 4 class members were awarded retroactive competitive seniority to 1974. In recreating the conditions for that year, the district court must have intended that 5 out of the 6 hirelings should have been either black or Hispanic. Although only one laborer, a white man, was hired in 1976, seniority retroactive to 1976 was awarded 4 class members.

According to appellees' own computations, in 1969, the laborer work force at the Garden consisted of 48 whites, 2 blacks and 2 Hispanics. Appellees' Brief at 9. Between 1970 and 1978, the Garden hired 33 laborers referred to it by the Union, of whom 6 were either black or Hispanic. *Id.* at 8. The minority hiring rate during these years was thus 18.2%. The district court held that, for purposes of retroactive competitive seniority, 17 class members should have been hired during this period, for purposes of

non-competitive seniority, 10 class members should have been hired, and for purposes of back pay awards, 13 class members should have been hired. Had 17 class members been hired, the racial composition of labor hirings during this period would have been 69% black or Hispanic. Had 13 class members been hired, the composition would have 57% black or Hispanic. Had 10 been hired, 48% of the hirelings would have been black or Hispanic. This is hardly a recreation of the conditions that would have existed had there been no discrimination.

A court that finds unlawful discrimination is not required to grant retroactive relief. *City of Los Angeles v. Manhart*, 435 U.S. 702, 718 (1978). "To the point of redundancy, the statute stresses that retroactive relief 'may' be awarded if it is 'appropriate.'" *Id.* at 719. Moreover, such remedy as is given should not constitute a windfall at the expense of the employer, its union, or its white employees. *See United States v. United States Steel Corp.*, 520 F.2d 1043, 1055 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976), *Guardians Ass'n of the New York City Police Dept. v. Civil Service Commission*, 539 F. Supp. 627, 630 (S.D.N.Y. 1982); *Patterson v. Youngstown Sheet and Tube Co.*, 475 F. Supp. 344, 354 (N.D. Ind. 1979), *aff'd*, 659 F.2d 736 (7th Cir.), *cert. denied*, 454 U.S. 1100 (1981). Title VII imposes no duty to maximize the hiring of minority employees. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78 (1978). Remedial relief should be granted only to those class members who would have filled vacancies had there been no discrimination. *See Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 284-87 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982). The district court's judgment, based on the concept that all class members with unexpressed employment desires should

have been hired regardless of the number of vacancies and competing applicants, is based upon a hypothetical hiring practice which the law did not require and which, in actuality, never would have been followed absent any trace of discrimination.

James O'Hara, the Union representative for the Garden laborers and the person who made job referrals, received over 300 requests for jobs during the period at issue, not a single one of which came from a class member. There is nothing in the record to indicate that, discrimination aside, class members would have been given preference over other applicants. Indeed, since the Union counted 4,300 blacks and Hispanics among its own members, it is unlikely that preferred treatment would have been given to members of another union. In view of the limited number of vacancies that occurred, we conclude that, to the extent that back pay was awarded to more than 7 class members, it constituted an unwarranted windfall and did not recreate the conditions that would have existed in the absence of discrimination.

Because of the statistical limitations inherent in the small samples available to plaintiffs' expert witness, her testimony concerning disproportionate hiring did not focus on any particular year. Faced with the same limitations, neither this Court nor the district court can state accurately when the 7 class members should have been hired. Under such circumstances, we think it would be inequitable to award back pay to only the first 7 class members who indicated a "desire" to become laborers. The fairer procedure, we believe, would be to compute a gross award for all the injured class members and divide it among them on a pro rata basis. *See Stewart v. General Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1971); *Pettway v. American Cast*

Iron Pipe Co., 494 F.2d 211, 263 n.154 (5th Cir. 1974). In determining the amount of the gross award, however, we think it fair to both the Union and the class members to assume that the Union would have referred the 7 class members who first desired employment, had they applied, and to base the class award on the loss attributable to these 7 men.

The first 7 "applicants", determined by their seniority dates, and the back pay awards made them by district court, are:

1. Clarence Lamar	$ 55,120
2. Wilfred Boudreaux	51,010
3. William Moody	53,298
4. Herbert Holmes	57,604
5. Henry Ingram	27,202
6. Kenneth Williams	61,494
7. James Britt	39,988
	$345,716

The total award to these men, $345,716, is equal to approximately 52.14% of the total award of $663,085 which the district court made to all 18 back pay recipients. Proration by 52.14% of the 18 individual awards produces the following figures:

1. Shelly Anderson	$ 16,578.43
2. Wilfred Boudreaux	26,596.61
3. James Britt	20,849.74
4. John Carroll	9,630.78
5. Russell Footman	11,123.03
6. Waverly Green	10,675.67
7. Graydon Griffith	18,963.84
8. Lawrence Hawkins	24,746.17
9. Francisco Hernandez	23,836.84

10. Herbert Holmes	30,034.73
11. Henry Ingram	14,183.12
12. Clarence Lamar	28,739.57
13. William Moody	27,789.58
14. James Parrott	19,611.94
15. James Perry	8,775.16
16. James Pettigrew	11,628.78
17. George Sharpe, Sr.	9,905.56
18. Kenneth Williams	32,062.97
	$345,732.52

The district court's award of back pay is modified in accordance with the foregoing figures.

Front Pay

Since this action was begun, at least 6 class members to whom the district court made back pay awards have been hired by the Garden, 5 of them on November 5, 1979, and one on December 20, 1980. The district court has indicated that it intends to make front pay awards for future losses to the twelve remaining back pay recipients. For the reasons already expressed, we believe it is completely unrealistic to assume that all 18 back pay beneficiaries would have been hired had there been no discrimination practiced against them. Accordingly, we deem it unfair to the members of the defendant Union, black, Hispanic, and white, to impose a continuing liability upon their association for the loss of future benefits. This unfairness is exacerbated by the fact that the Union has no control over future hirings, which are the sole prerogative of the Garden, and is therefore in no position to bring its liability for front pay to an end. Under these circumstances, we believe that it would be an abuse of

discretion for the district court to make front pay awards against the Union to class members not already hired.

Retroactive Seniority

The same factors which dictate the limitation of back pay and front pay awards also militate against the grant of retroactive seniority to future hirelings. In addition, we view pendent grants of retroactive seniority as self-defeating, in that they militate against the likelihood that the beneficiaries of the grants will be employed. Under the consent decree which terminated plaintiffs' action against the Garden, the Garden agreed that every second job opening would be offered to minorities until their representation among the Garden's laborers reached 27%. 482 F. Supp. at 417 n.4. Because at least 9 minority laborers have been hired since the execution of the consent decree, 6 of whom were class members, it is not at all unlikely that the 27% quota has been reached and the compulsory hiring of class members has come to an end. Relations between the Garden and its presently employed laborers will not be improved by the voluntary hiring of additional class members who will be granted automatic seniority under the terms of the district court's judgment. For all the foregoing reasons, we think that the proper exercise of discretion would limit the grant of retroactive seniority to the 6 or more class members already hired.

Attorneys' Fees

Like the steamfitters union in *Rios v. Enterprise Ass'n Steamfitters Local 638*, 400 F. Supp. 993 (S.D.N.Y. 1975), *aff'd in relevant part*, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977), the Union is a non-profit association comprised primarily of members who earn

their living with their hands. It is upon these members that the burden of the award against the Union for attorneys' fees eventually will fall. Instead of exploring this matter before the Magistrate to whom the question of fees was referred, defense counsel, in the Magistrate's words, spent his time in a "vexatious, time-wasting attack on plaintiffs' counsel and in an unfruitful, nitpicking excursion through innocuous details and markings in plaintiffs' counsels' time logs and records."

Despite the truth of this observation, we are aware that the Union cannot pass on to customers the expense of plaintiffs' attorney's fees, *see Hall v. Cole*, 412 U.S. 1, 15 n.23 (1973), and this places special emphasis upon our duty to see that the liability imposed upon the Union does not include a windfall for plaintiffs' attorney. Although fee awards are generally within the discretion of the district court, this Court may intervene where that discretion has been abused. *Faraci v. Hickey-Freeman Co.*, 607 F.2d 1025, 1028 (2d Cir. 1979); *Mid-Hudson Legal Services, Inc. v. G&U, Inc.*, 578 F.2d 34, 37-38 (2d Cir. 1978).

We have no problems with the allowance to plaintiffs' attorney, Lewis Tesser, based upon 1,280 hours at $100 per hour. Both figures are reasonable and are supported by the evidence. The allowance for the work performed by Mr. Tesser's assistant, Marjorie Altman, presents a different situation. Miss Altman, who was admitted to practice in March 1978, was employed by Mr. Tesser at a salary of $200 per week. Mr. Tesser conceded, moreover, that Miss Altman put in "significantly" more than 50 hours per week. The Magistrate allowed Mr. Tesser $50 per hour for the work done by Miss Altman in 1978 and $65 per hour for the several ensuing years, stating that these rates "were *lower* than the going rates for attorneys

of like skill and experience in the area" as testified to by Mr. Tesser's expert witness, Kathleen Peratis, Esq. (emphasis in original). This was not so. Miss Peratis testified that, for an attorney with 0 to 4 years' experience, a reasonable rate would be "from $35 to $65 an hour." We conclude that, insofar as Miss Altman's hourly rate for 1978 exceeded $35, the 1979 rate exceeded $45, and the 1980 rate exceeded $55, Mr. Tesser was the recipient of an unwarranted windfall. The allowance for counsel fees, including interest, is reduced by a total of $15,997.14.

The judgment of the district court is modified by:

(1) Reducing the individual back pay awards in accordance with the figures above set forth;

(2) Deleting the provision for future front pay awards;

(3) Deleting the provisions for the grant of retroactive seniority to class members hereafter hired;

(4) Reducing the award for attorneys' fees by $15,997.14.

As so modified, the judgment is affirmed without costs to either party.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HENRY INGRAM, JAMES BRITT, WILLIAM MOODY, and ROY T. FLOYD, individually and on behalf of all persons similarly situated,

Plaintiffs,

-and-

FRANCES WILLIAMS, EDWARD MILON, HORACE MITCHELL, HERBERT BRUTON, JOVINO GARCIA,

Intervenors,

-against-

MADISON SQUARE GARDEN CENTER, INC., MADISON SQUARE GARDEN CORPORATION, ALLIED MAINTENANCE CORPORATION, ALLIED PUBLIC EVENTS SERVICE CORPORATION, and LOCAL #3, I.B.E.W.,

Defendants.

76 CIV 5870 (LBS)

OPINION #49135

SHELLY L. ANDERSON, JAMES L. PERRY, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

MADISON SQUARE GARDEN CENTER, INC., MADISON SQUARE GARDEN CORPORATION, ALLIED MAINTENANCE CORPORATION, ALLIED PUBLIC EVENTS SERVICE CORPORATION, LOCAL 3 I.B.E.W., LOCAL 54, SERVICE EMPLOYEES INTERNATIONAL UNION,

Defendants.

76 CIV 1453 (LBS)

APPEARANCES: (See last page)

SAND, D.J.

In each of two separate cases now consolidated for trial, suit was brought by two classes which together comprise all black and hispanic persons who have been or will in the future be employed as "cleaners"[1/] by the defendants Madison Square Garden Center, Inc. ("Center, Inc."), Madison Square Garden Corporation ("Garden Corp."), Allied Maintenance Corporation ("Allied"). Local #3, International Brotherhood of Electrical Workers ("Local 3"), is also named as a defendant in these actions.[2/] Plaintiffs allege that defendants violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 20003 (1970) and the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981

and 1985 (1970) respectively,[3] by engaging in a pattern of hiring and employment practices which made it impossible for class members to secure the higher paying and generally more desirable position as "laborer" at Madison Square Garden ("the Garden"). Prior to trial, Center, Inc., Garden Corp., AMC and Allied all entered into a proposed consent decree,[4] and the consolidated trial of these two actions was limited to the issue of Local 3's liability under the employment discrimination statutes involved. The question of damages was left for separate consideration should liability be found.

The plaintiffs in each suit were arranged in a Title VII class and a §§ 1981 and 1985 class. In the first suit, the "Ingram" action, the Title VII class is limited to black persons

employed as "cleaners" since February 14, 1973, and the §§ 1981 and 1985 class to those black and hispanic persons so employed since December 30, 1973. In the second suit, the "Anderson" action, the two classes are identically described except for the limitation dates, which in the Anderson action are May 28, 1975 and March 31, 1975, respectively. On August 13, 1973, the Ingram plaintiffs filed charges against "Madison Square Garden" and AMC with the Equal Employment Opportunity Commission ("EEOC") pursuant to 42 U.S.C. § 2000e-5. Notices of "Conciliation Failure" and "Right to Sue" were issued on October 4, 1976 and on December 30, 1976, within the 90 day jurisdictional period provided by 42 U.S.C. § 2000e-5 (f)(1), the Ingram plaintiffs filed their initial complaint in this action

against Center, Inc. and AMC. The complaint was subsequently amended to include Allied, Garden Corp. and Local 3. Local 3, which was served with a summons and complaint on June 22, 1977, was not a party to the Ingram EEOC action. On November 24, 1975, the Anderson plaintiffs filed charges with the EEOC against "Madison Square Garden", AMC and Local 3, and a notice of right to sue was issued on January 16, 1978. The Anderson complaint was filed on March 31, 1978 and served on Local 3 (which was a party to the Anderson EEOC action) on August 21, 1978.[5/]

The crux of plaintiffs' complaint with respect to Local 3 is that the union, which is the bargaining agent for the "laborers" at the Garden and which refers prospective employees

to the Garden for employment as laborers, employs a completely subjective and standardless referral policy, relying almost entirely on word of mouth and favoritism, and that the policy operates to discriminate against class members by preventing them from becoming laborers.[6/] The defendant, in addition to denying that the manner in which it refers laborers to the Garden violates any of the employment discrimination statutes involved, also interposes several jurisdictional issues and the statute of limitations as a defense. The Court concludes that the defendants' threshold objections with respect to Title VII and § 1981 are without merit,[7/] and finds that Local 3's referral "policy" violates both provisions. The plaintiffs' § 1985

claims, however, are dismissed in accord with the Supreme Court's recent ruling in Great American Federal Savings & Loan Assoc. v. Novotny, 20 EPD 30,004 (1979). The following discussion constitutes our findings of fact and conclusions of law pursuant to F.R.C.P. 52.

I. The Employment Structure at the Garden

Center, Inc. currently employs a staff under the direction of a superintendent at the Garden. The staff includes electricians, oilers and firemen, engineers, carpenters, painters and laborers. Prior to July 2, 1969, Center, Inc. also employed personnel in the job category referred to herein as "cleaners". On that date, Center, Inc. completed a process it had begun two years earlier[8/] by entering into a contract with Allied under which Allied

agreed to provide all janitorial and lavoratory services at the Garden. Center, Inc. employees in the cleaner category were offered the opportunity to work for Allied at the Garden in the same capacity in lieu of discharge, and most accepted.[9/] Allied currently provides all janitorial and lavatory services at the Garden, and the work of the cleaners is substantially the same today as it was in the pre-Allied period.

Laborers effect the change-overs from one event to the next, a task which requires them to erect and remove various structures, operate vehicles such as forklifts, ice scrapers and vans, effect repairs in the roof, floors, sidewalks and athletic or other equipment, and move around various heavy objects. The

laborers also spend a portion of their time cleaning, but the parties disagree as to how much time is so spent.[10/] Although the Court agrees with defendant's contention that the question is irrelevant to the issue of whether Local 3 has violated the employment discrimination statutes, the Court finds that the job of laborer is, on the whole, more strenuous than that of cleaner, but that laborers spend between one-third and one-half of their day performing tasks similar or identical to those performed by cleaners. The Garden imposes no independent qualifications for the job of laborer other than passing the physical examination required of all employees,[11/] and it generally hires laborers through the union referral process described below.

Cleaners perform general cleaning and janitorial functions at the Garden such as mopping, washing, dusting, trash removal, etc., and those cleaners classified as lavatory attendants perform similar functions in the lavatory areas only. The hiring of cleaners is done solely by Allied, which recruits its employees from various sources and which imposes no specific physical or education requirements for the position of cleaner at the Garden.[12/] Cleaners generally earn between 65% and 70% of what laborers earn, and the differential in other employment benefits, e.g., pension and annuity plans, appears to be substantial. All employees at the Garden in the cleaner category are represented by Local 54.

The laborer force at the Garden

has historically been all white. Prior to January 1, 1965, the effective date of Title VII, and since at least 1948, there had been no black or hispanic person employed as a laborer. Between 1965 and 1969, one of the twenty-two new laborers hired was black and one was hispanic, the rest were white. By July, 1977, around the time this law suit was initially filed, thirty-eight new laborers were hired, thirty-three of whom were white, four black and one hispanic. The 1978 Garden laborer work force consisted of fifty-five employees, forty-seven of whom were white, five black and three hispanic. The composition of the laborer work force has thus changed only slightly since blacks or hispanics were first hired in 1969.

By contrast, the cleaners work force, with the exception of those classified as six day cleaners, has

historically been almost exclusively black. The lavatory attendants were all black in 1978, and have been all black since at least 1948. The five day cleaners were all black between 1948 and 1969, and in 1978, of the thirty-four employees in that category, twenty-four were black, seven were hispanic and three were white. In 1978, the six day cleaner force, which was at one time composed largely of white women, totaled twenty-eight workers, of whom twelve were white, one black and fifteen hispanic. No cleaner in either category has ever transferred to a laborer position.

II. Laborer Hiring at the Garden and Local 3 Referrals

The testimony of both Garden and Local 3 officials at trial revealed that since at least 1941, the

hiring of laborers at the Garden has proceeded in the following manner:[13/] when a vacancy in the laborer force occurs, the Garden superintendent, currently and for the past thirty-seven years Mr. Richard Donopria, either advises the Local 3 shop steward, currently a Mr. Mel Mullins, or advises the union directly, in the person of Mr. James O'Hara. O'Hara is one of three assistant business managers of Local 3 and, since 1969, has been the union's representative for the laborers. O'Hara alone makes referrals to the Garden for the position of laborer, and when Donopria is in contact with Mullins, Mullins informs O'Hara. In either case, once the union is advised that a vacancy exists, it sends a person with a "slip" indicating that he had been sent by the union to see Donopria. Donopria testified that he always checks to see whether

an applicant had been sent by the union, and that he had hired laborers without a union slip only on special occasions for temporary spots. Thus, all of the Garden's permanent laborer hiring results from Local 3 referrals,[14/] although Center, Inc. may reject, for any reason, a person referred by Local 3 for a laborer's position. Center, Inc. does not advertise laborer vacancies in newspapers nor does it advise its employees or Allied employees at the Garden that such vacancies exist.

The practice followed by Local 3 in determining who to refer to the Garden in response to a request by Mr. Donopria for a new laborer can best be characterized as subjective and standardless. The union has no procedure by which one may register for referrals to the Garden as a laborer, and no list or record of workers seeking such a referral is

kept. There is no regular procedure by which unemployed members of other Local 3 divisions can obtain referral for laborer work, despite the fact that other Local 3 divisions do have a referral procedure for unemployed members. Local 3 gives no test to, and requires no apprenticeship of, the people it refers to the Garden for employment as a laborer, and even union membership is not a prerequisite. Indeed, most of the people referred to the Garden during Mr. O'Hara's tenure were not union members. The only requirement for referral appears to be that the applicant be a friend, relative or the relative of a friend of Mr. O'Hara. O'Hara explicitly testified that most of the referrals were made on the basis of personal acquaintance, favorable impressions at interview and as the performance of favors for other persons.

The result of Local 3's referral "policy" was the near perpetuation of the completely segregated Garden laborer work force that existed until 1969. Although neither Local 3 nor Mr. O'Hara keep records of the Garden's requests for referrals or of the referrals actually made, O'Hara himself remembers the circumstances surrounding the referral of thirty-seven men to the Garden for the position of laborer. Of these, thirty-one were white, four black and two hispanic. Except for four who were recommended by others "associated" with Local 3, all of the white referrals were recommended by, or were themselves, friends of O'Hara, and only four were already members of Local 3. Of those four, one was O'Hara's son, and two were his friends. By contrast, all of the six minority members whom

O'Hara remembers recommending were already members of other Local 3 divisions.[15] Of a total of thirty-seven new hires during O'Hara's tenure, thirty-one have been white, four black nd two hispanic. At least one of the minority referrals took place after this litigation commenced, at which time O'Hara, by his own testimony, had already made known to Garden officials his desire to increase minority representation on the laborer work force.[16]

III. Attempts By Class Members to Secure a Laborer's Position

Given the identical employment qualifications and the similarity of working conditions, it is hardly surprising that at least some of those employed as cleaners would attempt to secure a higher paying laborer's job. This is precisely what six class members claimed at trial to have done,

and although much of this testimony was disputed, the Court finds that members of the plaintiff classes did, in fact, seek a laborer's position. Moreover, the Court also finds, as the plaintiffs contend, that those efforts were deliberately frustrated by union personnel who, on a number of occasions, either ignored, gave evasive answers to or just generally gave the run-around to class members who sought information from them as to how to become a laborer.[17/] Although the number of these incidents was not great, the Court finds convincing plaintiffs' argument that given the context of two largely segregated work forces on the same site, defendant union's actions, in combination with those of the other defendants, were sufficient to "get the message across" and created an atmosphere which discouraged class

members from actively seeking a laborer's position.[18]/

Finally, the Court is not impressed with Local 3's argument, supported by O'Hara's testimony at trial, that the union did not recruit laborers from among class members because they were members of Local 54, a rival union with whom Local 3 had continuing jurisdictional disputes. As O'Hara himself testified at trial, those laborers who at the time of their employment were not members of Local 3, were required to join the union within thirty days. The result of referring a Local 54 member would thus be no different, insofar as Local 3 membership is concerned, than the referral of any other person not a member of any union. Local 54 was in no position to gain by such a referral, and Local 3 had nothing to lose. Defen-

dant's argument would be more convincing if Local 3's policy had been to refer only Local 3 members for the laborer's position at the Garden, but it is clear that this was not the case.

IV. Jurisdiction

Defendant's remaining jurisdictional objections relate to plaintiff's[19] claims under §§ 1981 and 1985. With respect to § 1985, defendant urges that the recent Supreme Court decision in Great American Federal Savings & Loan Assoc. v. Novotny, 20 EPD 30,004 (1979), which held that § 1985 may not be invoked to redress violations of Title VII, precludes plaintiffs' claims under § 1985. Plaintiffs' answer that the § 1985 claims they assert "transcend" Title VII, and that they should thus be exempted from the Novotny ruling.

The Novotny decision was based on the Court's conclusion that the detailed statutory procedure designed by Congress to govern Title VII claims, a procedure which emphasizes non-adversarial concilation efforts and which incorporates federal and state administrative components, would be circumvented if § 1985 suits could be brought for the same type of claims.[20/] The case of the Ingram Plaintiffs, who it will be recalled did not name Local 3 in their EEOC charge, is precisely the situation addressed by the Court in Novotny. Even where an EEOC charge is filed, however, Novotny precludes § 1985 relief for what amounts to a Title VII violation: the Novotny plaintiff's § 1985 claims were dismissed despite the fact that he had complied with all the jurisdictional prerequisites

for a Title VII suit.

Plaintiffs here have given no indication of how their claims "transcend" Title VII and this Court, on the record before it, cannot see the basis for their claim.[21/] The § 1985 claims of all plaintiffs herein are dismissed.

In regard to plaintiffs' § 1981 claims, defendant's objections are unfounded. Unlike § 1985, § 1981 creates substantive rights which may be redressed in a federal court without regard to whether Title VII remedies are pursued or whether there has been compliance with Title VII jurisdictional prerequisites. The two statutes are completely independent, and a plaintiff can maintain both a Title VII and a § 1981 action arising out of the same set of facts. Johnson v. Railway Express Agency,

421 U.S. at 462, and the applicable period in New York is three years. See Keyse v. California Texas Oil Co., 78-7087 (2d Cir. 1978) (slip op.); Cates v. Trans-World Airlines, Inc., 561 F.2d 1064, 1067 n.4 (2d Cir. 1977). The limitations period for Title VII is found at 42 U.S.C. 2000-5(e), which provides that an EEOC charge must be filed within 180 days of the alleged discriminatory act, or within 300 days if the charge is first referred to a state agency. The Ingram plaintiffs, who rely solely on § 1981, commenced their action in December of 1976. The Anderson plaintiffs, who rely on both Title VII and § 1981, filed EEOC charges on November 24, 1975, and commenced their law suit, including their § 1981 claim, on March 31, 1978.

Even if defendants were correct in their claim that the individual

incidents alluded to at trial preceded the limitations period, the argument misses the point. What plaintiffs challenge, and what is at the heart of this law suit in its present form, is a referral policy continuously adhered to by the defendant which operates to exclude class members from the Garden laborer force. Since the plaintiffs allege a continuous and present practice of discrimination rather than a single isolated act, the statute of limitations is no bar. Acha v. Beame, 570 F.2d 57 (2d Cir. 1978).

VI. The Composition of the Class

In his closing argument to the Court at trial, defendant's counsel raised the question whether a union such as Local 3 could be held to a "duty" under Title VII or § 1981 to recruit laborers from a class composed entirely of members of another

union. This argument cannot withstand close scrutiny.

As a practical matter, as we have noted supra at page 10, defendant suffers no disadvantage by referring class members to the Garden, particularly given Local 3's current referral policy. But more importantly, defendant union seems to misconstrue the nature of its duties under the employment discrimination laws. Under those statutes, a union which takes part in the hiring process is obligated to do so in a manner which does not discriminate on the basis of race, ethnicity or sex. (See discussion and cases cited in the next section.) That "duty" is not limited to union members, and it is not inapplicable to those who belong to another union; it is a duty which runs to all those who are or might be affected by its

breach. See, Arnold v. Consolidated Freightways, Inc., 399 F.Supp. 76 (S.D.Tx. 1975) (a union does not have to be the collective bargaining agent for a plaintiff employee in order for it to be subject to § 1981 liability). In this case, plaintiff classes, while they obviously do not encompass the entire potential black and hispanic work force for laborers, were composed of those people who, in the Court's judgment, were most likely to seek a laborer's position, and who were therefore most likely to be effected by Local 3's referral policy.

VII. Title VII and Section 1981 Liability

It is well established that § 1981, as well as Title VII, affords a federal remedy against discrimination in private employment, see Johnson v. Railway Express Agency, 421 U.S. 454

(1974) and that the statute applies to acts of discrimination by unions as well as by employers. In applying § 1981 to employment discrimination cases, courts have almost universally applied Title VII standards and principles, and this Circuit has explicitly held that no greater or lesser protection from employment discrimination is provided by § 1981 than is provided by Title VII. See Carrion v. Yeshiva University, 535 F.2d 722 (2d Cir. 1976). Thus, in the discussion that follows, plaintiffs' Title VII and § 1981 claims will be treated together, and proof that establishes a violation of one will be taken as proof of a violation of the other.

A Title VII of § 1981 violation can be based on proof of either "disparate treatment" or "disparate impact". Plaintiffs argue that both

are present here and the Court agrees. The Court finds that Local 3's referral policies violated both Title VII and § 1981.

A. Disparate Impact

The disparate impact line of Title VII analysis stems from the Supreme Court's decision in Griggs v. Duke Power Co., 401 U.S. 424 (1973). Essentially, if the criteria used by an employer or union to determine job eligibility "operate to exclude" minority members, then despite a lack of discriminatory intent, a prima facie case of employment discrimination is made out and the burden shifts to the employer or union to demonstrate a substantial relationship between the criteria and job performance. See Alvarez-Ugarte v. City of New York, 391 F.Supp. 1223 (SDNY 1975). The courts of this Circuit have described

this burden as "heavy", and as a burden of persuasion rather than simply a burden of going forward with the evidence. Vulcan Society of New York City Fire Dept. v. Civil Service Commission, 490 F.2d 387 (2d Cir. 1973); Alvarez-Uqarte, supra.

Local 3's standardless and for the most part implicit policy of limiting referrals largely to personal friends or acquaintances of its business agent and laborer representative, James O'Hara, clearly operated to exclude the minority employees who make up the plaintiff classes. While less than 16% of the referrals[24/] during Mr. O'Hara's tenture involved blacks or hispanics (none of whom were cleaners), the combined percentage of blacks and hispanics in the labor market surrounding the Garden is somewhere between 26% and 34%.[25/] Such a statistical

disparity is alone, of course, insufficient to establish a Title VII violation. But statistics are of recognized importance in employment discrimination cases and, under some circumstances, may be sufficient to establish a prima facie case. Teamsters v. United States, 431 U.S. 324 (1977); Barnett v. W. T. Grant Co., 518 F.2d 543 (4th Cir. 1975). In this case, moreover, the inference of discrimination raised by the statistics is bolstered by the fact that Local 3's referral "system" was completely standardless and ultimately reliant on "word of mouth" recruitment, both of which have been universally criticized by the courts as tending to perpetuate segregated and discriminatory employment patterns. See, e.g., Barnett v. W.T. Grant Co., supra (word of mouth hiring perpetu-

ates a white work force; lack of objective standards always suspect); Pennsylvania v. Local Union 542 International Union of Operating Engineers, 459 F. Supp. 329 (E.D.Pa. 1978) (statistical disparity plus arbitrary handling of referrals by union results in a Title VII violation); EEOC v. Raditor Specialty Co., 16 EPD 8276 (W.D.N.C. 1978) (word of mouth hiring plus failure to post job vacancies corroborate inference raised by the statistical pattern); Neely v. City of Grenada, 438 F. Supp. 390 (N.D.Miss. 1977) (same).

Looking to the statistical disparity and the surrounding circumstances, see Teamsters v. United States, supra, at p. 338, it is clear that plaintiffs have established a prima facie case of a Title VII and a § 1981 violation by defendant union Local 3. Defendant has offered no

evidence of a "business justification" other than to point out that plaintiffs belonged to a "rival union". This argument has been discussed and dismissed above, but in any case, a requirement that an applicant for referral not belong to a rival union would not be substantially related to job performance. Since defendant has not rebutted plaintiffs' prima facie case, the proof of disparate impact is sufficient to establish a violation of the two employment discrimination statutes involved herein.

B. Disparate Treatment

In a disparate treatment case, the critical issue is proof of a discriminatory motive. Teamsters v. United States, 431 U.S. 324 (1977). While the plaintiffs have the initial burden to establish a prima facie case, that burden is satisfied by

a showing similar to that required in the disparate impact cases: proof of discriminatory motive can rest on a statistical disparity plus an examination of the surrounding circumstances. Teamsters v. United States, supra, at 338. Thus. the evidence discussed above is sufficient to establish a Title VII or § 1981 violation based on disparate treatment, as well as on disparate impact.

VIII. Relief

Plaintiffs seek an injunction ordering Local 3 to standardize its referral practices with respect to class members by maintaining a register of class members seeking referral for the job of laborer and by conspicuously posting within the Garden notice of how to register for such a referral. Plaintiffs also request that the union be ordered to refer to the Garden class

members seeking a laborer's position in order of their current seniority, and that after referral, such employees should be credited with full seniority for all purposes for the same number of years that the class member involved worked as a cleaner. Finally, plaintiffs seek back pay for all class members who unsuccessfully applied for a laborer's job, and for all class members who would have applied but for the belief that such application would be futile. Reasonable attorney's fees and costs are also sought.

Only the issue of Local 3's liability has been tried thus far, but it is clear that plaintiffs' demand for retroactive seniority for those cleaners who ultimately become laborers will dominate the remedial stage of these proceedings. The parties are directed to appear before this Court on October 17, 1979 for a hearing on all

remedial issues, particularly whether the circumstances here are appropriate for an award of retroactive seniority. See Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transport Co., Inc., 424 U.S. 747 (1976). If the Court finds that such relief is appropriate, it will at that time establish a procedure for making the individual determinations necessary to decide which class members were "actual victims of... discriminatory practices". Teamsters v. United States, 431 U.S. at 371-372.

SO ORDERED.

Dated: New York, New York
October 3, 1979

U.S.D.J.

FOOTNOTES

1/ The term "cleaners" is used in this opinion to describe those employed at the Garden as either "five day" cleaners, "six day" cleaners, bowling alley cleaners, bathroom attendants or elevator operators. Where relevant, the respective duties of those employed at the Garden are described below. Each of the four classes involved in this action also includes those persons fitting the class description who receive pensions based on their past employment as cleaners at the Garden.

2/ The cleaners union, Local 54, Service Employees International Union, was also named as a defendant in this action. However, since plaintiffs have not pressed their claims against Local 54 and since counsel for that defendant did not participate in these proceedings, the claims against that party are considered as having been dropped by plaintiffs.

3/ It has generally been held, in this and other Circuits, that the filing of a timely charge with the EEOC against an employer or union is a jurisdictional prerequisite to the bringing of a Title VII suit against the same defendant. Schick v. Bronstein, 447 F.Supp. 333 (SDNY 1978); Bertheas v. TWA 450 F.Supp. 1069 (EDNY 1978); Gabriele v. Chrysler Corp., 573 F.2d 949, 954 (6th Cir. 1978); Miller v. International Paper, 408 F.2nd 283 (5th Cir. 1969). As is clear from the discussion below, Local 3 was not named as a party in the EEOC proceeding which preceded the first (the "Ingram" action) of the two law suits involved here. Although there are exceptions to the general rule just described, see e.g., Schick v. Bronstein, supra; Stith v. Manor Baking Co., 418 F.Supp. 150, 156

Footnotes continued...

(W.D.Mo. 1976), and although it is not entirely clear that the Ingram plaintiffs' Title VII claim against Local 3 would not fit under one of these exceptions, plaintiffs' counsel conceded that the claim is barred by the failure to name Local 3 in the EEOC charge. Thus, insofar as the Ingram plaintiffs are concerned, plaintiff relies solely on its § 1981 and § 1985 claims.

4/ Under the terms of the proposed decree - which is pending before this Court for approval - Center, Inc., Garden Corp., AMC and Allied ("the defendants"), while maintaining that "they are and always have been in full and complete compliance" with Title VII and all other federal and state employment discrimination statutes, agree to work towards the goal of employing blacks and hispanics ("minorities") at the Garden as laborers in accordance with their general proportion in the labor force in the New York local labor market. To this end, the plaintiffs and Garden defendants agree to the following:

(1) five of the members of the plaintiff class, (Ingram, Britt, Pettigrew, Boudreaux and Perry) will be given the opportunity to become laborers before any other person is hired as a laborer by Center, Inc., which retains its good faith right to reject or terminate employment of these plaintiffs.

(2) Center, Inc. will thenceforth use its best efforts to fill every second available job in the laborer's force with a qualified minority applicant - with qualified class members having the opportunity to fill every fourth (i.e., every

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second minority) position, until minority representation among the laborers reaches 27%.

(3) The decree is not applicable either to the hiring of laborers on a "temporary" basis as defined in the decree, or to the reemploying of laborers who are at present or in the future may be laid off. Center, Inc. is not obligated to increase the number of permanent laborers.

(4) Nothing in this agreement effects the seniority or other rights of existing laborers, except that the defendants agree to be bound by any order or settlement regarding seniority subsequently entered against Local 3.

(5) After the 27% goal is reached, and for not less than 5 years from the effective date of the decree, or one year after the 27% goal is reached, whichever occurs later, Center, Inc. is required to post notices of laborer openings at a prominent place within the Garden, setting out application procedures and necessary qualifications. There is no obligation to maintain minority representation within the laborer force at or above the 27% level at all future times.

(6) Defendants agree to pay $117,500 to the named plaintiffs and all class members in full settlement of plaintiffs' monetary claims.

(7) Defendants will not oppose an application by plaintiffs' attorney for legal fees and expenses in the sum of $47,500, and counsel for plaintiffs will

continued...

make no application against the settling defendants for legal fees in excess of that amount. Plaintiffs also agree to indemnify settling defendants from any claims or judgments against them resulting from any order or settlement with Locals 3 or 54.

(8) Notice of this proposed decree was mailed or personally delivered to members of the plaintiff class on September 28, 1979.

Given the terms of the proposed consent decree and this Court's finding as to Local 3's liability, the primary question in the remedial stage of this proceeding will be the seniority rights of class members who become laborers.

5/ A complaint in intervention was filed by intervenors Williams, Milon, Mitchell and Garcia on June 30, 1978, and a Sixth Amended Complaint, containing the combined charges of the plaintiffs and intervenors was served on July 16, 1979.

6/ Plaintiffs have made a number of other allegations concerning an alleged conspiracy between defendants and Local 3's status as an employment agency under 42 U.S.C. 2000e(c). Given our decision in this case, a resolution of those issues is unnecessary here.

7/ Except with respect to the Ingram Title VII claim, which is discussed in footnote 3 above.

8/ Beginning in August, 1967, Center, Inc. entered into a series of contracts with AMC or its subsidiaires, of which Allied is one, by which the latter agreed to take over and supply the labor force for

continued...

various cleaning and janitorial functions at the Garden. This process culminated in the July 2 contract, which covered all interior area services not already served by AMC or its subsidiaries.

9/ Elevator operators remain employees of Center, Inc. although they are members of Local 54 and are included in the classes involved here.

10/ Plaintiffs claim that cleaning functions occupy "69%" of a laborer's day. Defendant concedes only that such functions account for 2-1/2 hours per day.

11/ At trial, the Garden superintendent, Richard Donopria, testified that he "visually appraises" the physical ability of the men sent to him by the union, and that he occasionally has sent some people back because they were overweight. Each of those sent back was eventually hired, however.

12/ A physical examination, two letters of reference and a willingness to work on weekends are required of those Allied employees sent to work at the Garden.

13/ This account is drawn primarily from the testimony of Garden Superintendent Richard Donopria and Local 3 Assistant Business Manager James O'Hara.

14/ Donopria did testify that one person hired as a temporary watchman, whose aunt was a supervisor of the cleaners, eventually became a laborer. At his deposition, O'Hara claimed that this incident, involving a laborer by the name of Thomas Blewitt, was one of a "couple" in which someone at the Garden recommended a man to him. He

continued...

further testified that Blewitt was the only laborer now working at the Garden that he knew of who was so recommended. O'Hara Dep. 13.

15/ Both plaintiffs and defendant agree that the minority members referred by O'Hara were specifically recruited on the basis of their race from other divisions of Local 3.

16/ O'Hara testified at trial that when the case started (but before Local 3 had been made a party), he had discussed the hiring of blacks with a Vice President of Operations at the Garden. The Garden official responded that any such hirings should wait until the case had been decided.

17/ Plaintiffs' witnesses also testified to similar activities on the part of Garden personnel. This testimony is not relied on here, since we are concerned solely with the liability of Local 3.

18/ Lawrence Hawkins, one of those class members who, on more than one occasion, sought information from union and Garden officials as to how to become a laborer, testified that he was "testing the waters", and after his inquiries were repeatedly ignored concluded that there was "no point". Hawkins also testified that he was told by Smith, a black laborer, that he would not want to become a laborer because he would receive a "hard time".

19/ It is not clear from defendant's brief whether this objection is limited to the Ingram § 1985 claim or whether it is addressed to all of the § 1985 claims

continued...

involved herein. Since the matter goes to this Court's power to hear these claims, we treat it as an objection to the § 1985 claims generally.

20/ The Novotny holding was also based on the Court's conclusion that § 1985 does not itself create any substantive rights but merely provides a remedy for the infringement of other federal rights. Since Title VII explicitly provides its own remedial scheme, it is not one of these federal rights which may be redressed by § 1985.

21/ There is thus no need here to address the question of whether Novotny would apply in a case where a plaintiff's claims in fact "transcend" Title VII.

22/ In fact, at least one witness, Ricardo Esparra, a cleaner at the Garden, testified at trial that he had asked Mel Mullins, the Local 3 shop steward, about becoming a laborer sometime during 1978, but that he "never got anywhere". Shelly Anderson, a cleaner at the Garden and another witness at trial, testified that he went to the union office in 1972 or 1973 to seek a position as a laborer. Although the timing of such individual incidents is irrelevant for statute of limitations purposes in light of the conclusion reached below, the Court finds that these witnesses did make inquiries about becoming laborers at the time alleged, and that no clear responses were forthcoming.

23/ They were on the premises, observed the laborers performing duties which they felt qualified to perform and were aware of the pay and benefit differentials.

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24/ At least one of these minority referrals occurred after this law suit commenced, and all took place after January of 1970. If the one referral which occurred in 1978 is not considered, the percentage of minority referrals drops to less than 14%, or 5 out of 37.

25/ All figures are based on the 1970 census and were offered by plaintiffs. The first figure is for the "Standard Consolidated Area" and includes New York City, Newark, Jersey City, Patterson-Clifton-Passaic, and Middlesex and Somerset Counties in New Jersey. The second figure represents the percentage of blacks and hispanics in the New York City labor force. A third figure offered by the plaintiffs is 27.4% for the "Standard Metropolitan Statistical Area", which includes the five counties of New York City, Rockland and Westchester Counties, New York and Bergen County, New Jersey. Since both laborers and cleaners are essentially unskilled or semi-skilled employees with no particular job qualifications, the unrestricted total work force statistics offered by plaintiff are sufficient. See, EEOC v. International Union of Elevator Constructors, Local Union No. 505, 398 F.Supp. 1237 (E.D.Pa. 1975); aff'd sub nom. United States v. International Union of Elevator Constructors, Local Union No. 505, 538 F.2d 1012 (3d Cir. 1976).

The inference of discrimination drawn by the statistical disparity present here is supported by the testimony of Dr. Beth Niemi, a labor economist at Rutgers who testified for the plaintiffs. Dr. Niemi testified that given the statistics described above, there is less than a one in one thousand chance that the laborer and

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cleaner work forces as presently constituted could have been drawn from the same labor market, i.e., that only some factor other than chance could cause a work force with the racial composition present here to be drawn from the total labor market.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

HENRY INGRAM, JAMES BRITT, WILLIAM MOODY, and ROY T. FLOYD, individually and on behalf of all persons similarly situated,

76 CIV 5870 (LBS)

Plaintiffs,

-and-

FRANCES WILLIAMS, EDWARD MILON, HORACE MITCHELL, HERBERT BRUTON, JOVINO GARCIA,

Intervenors,

OPINION #49241

-against-

MADISON SQUARE GARDEN CENTER, INC., MADISON SQUARE GARDEN CORPORATION, ALLIED MAINTENANCE CORPORATION, ALLIED PUBLIC EVENTS SERVICE CORPORATION, and LOCAL # 3 I.B.E.W.,

Defendants.
----------x

SHELLY L. ANDERSON, JAMES L. PERRY, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

76 CIV 1453 (LBS)

MADISON SQUARE GARDEN CENTER, INC., MADISON SQUARE GARDEN CORPORATION, ALLIED MAINTENANCE CORPORATION, ALLIED PUBLIC EVENTS SERVICE CORPORATION, LOCAL 3 I.B.E.W., LOCAL 54, SERVICE EMPLOYEES INTERNATIONAL UNION,

Defendants.
----------x

APPEARANCES: (See last page)

SAND, D.J.

This is a motion pursuant to F.R.Civ.P. 23(e) for approval of a proposed class action settlement or consent decree entered into between all four of the plaintiff classes in these two consolidated class actions and Madison Square Garden Center, Inc., Madison Square Garden Corporation, Allied Maintenance Corporation and Allied Public Events Service Corporation, referred to collectively herein as "the settling defendants". The factual and procedural background of this litigation is described fully in an earlier opinion of this Court in this matter dated October 3, 1979, wherein Local 3, International Brotherhood of Electrical Workers ("Local 3"), was found to have violated both Title VII of the Civil Rights Act

of 1964, 42 U.S.C. § 2000e (1970) and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970).[1/] Familiarity with the facts is therefore assumed in the discussion that follows.

Under the proposed decree, the settling defendants maintain that "they are and always have been in full and complete compliance" with Title VII and all other federal and state employment discrimination statutes, and agree to work towards the goal of employing blacks and hispanics ("minorities") at the Garden as laborers in accordance with their general proportion in the labor force in the New York local labor market. To this end, the plaintiffs and Garden defendants agree to the following:

> (1) Five of the members of the plaintiff class, (Ingram, Britt, Pettigrew, Boudreaux and Perry) will be given the opportunity to become laborers before

any other person is hired as a laborer by Madison Square Garden Center, Inc. ("Center, Inc."), which retains its good faith right to reject or terminate employment of these plaintiffs.

(2) Center, Inc. will thenceforth use its best efforts to fill every second available job in the laborer's force with a qualified minority applicant, with qualified class members having the opportunity to fill every fourth (i.e., every second minority) position, until minority representation among the laborers reaches 27%. Center, Inc. shall maintain a list of class members who apply for positions as laborers and shall extend offers to qualified applicants in order of seniority, as measured by the duration of each applicant's employment at the Garden.

(3) The decree is not applicable either to the hiring of laborers on a "temporary" basis as defined in the decree, or to the reemploying of laborers who are at present or in the future may be laid off. Center, Inc. is not obligated to increase the number of permanent laborers.

(4) Nothing in the agreement effects the seniority or other rights of existing laborers, except that the defendants agree to be bound by any order or settlement regarding seniority subsequently entered against Local 3.

(5) After the 27% goal is reached, and for not less than 5 years from the effective date of the decree, or one year after the 27% goal is reached, whichever occurs later, Center, Inc. is required to post notices of laborer openings at a prominent place within the Garden, setting out application procedures and necessary qualifications. There is no obligation to maintain minority representation within the laborer force at or above the 27% level at all future times.

(6) For so long as the aforementioned hiring constraints remain in effect, the Garden defendants shall provide quarterly reports of all laborer hiring to plaintiffs' attorney within thirty days following the close of each calendar quarter.

(7) Defendants agree to pay $117,500 to the named plaintiffs and all class members in full settlement of plaintiffs' monetary claims.

(8) Defendants will not oppose an application by plaintiffs' attorney for legal fees and expenses in the sum of $47,500, and counsel for plaintiffs will make no application against the settling defendants for legal fees in excess of that amount. Plaintiffs also agree to indemnify settling defendants from any claims or judgments against them resulting from any order or settlement with Locals 3 or 54.

Notice of the proposed decree was mailed via first class mail or personally delivered to each member of the plaintiff classes on September 28, 1979. The notice specifically informed class members of their right to object to the settlement and instructed them as to how to do so.[2/] No objections have been made, and at a hearing held on October 17, 1979, counsel for plaintiff and the settling defendants urged this Court to approve the settlement. The settlement is now approved to the extent set forth herein.

The purpose of requiring Court approval of a "dismissal" or "compromise" of a class action is to protect the interests of non-party class members. See George v. Parry, 77 F.R.D. 421 (S.D.N.Y. 1978), affirmed, 578 F.2d 1367 (2d Cir. 1978) (oral opinion). In determining whether a

settlement adversely affects such interests, the essential question is whether the proposed settlement is fair and reasonable and in the best interests of all those who will be affected by it. See Robertson v. National Basketball Ass'n, 556 F.2d 682 (2nd Cir. 1977). See generally, 7 A Wright and Miller, Federal Practice and Procedure, § 1797 (1972). Factors to be considered in making such a determination include the complexity, expense and likely duration of the litigation avoided by the settlement, the reaction of the class members to the settlement, the resources of the defendant, the stage of the proceedings and the amount of discovery completed, the risks attendant upon seeking a class remedy through litigation, and the reasonableness of the settlement in light of both the best possible recovery and the risks of litigation. See City of Detroit v.

Grinnel Corp., 495 F.2d 448 (2d Cir. 1974).

Rather than dwell at length on factors such as the complexity and risks of the potential litigation, it seems appropriate to focus on the two factors which the Court finds most significant in this particular case.[3/] First, no class member has objected to the proposed settlement. This factor takes on added importance in light of both the relatively small size of the class[4/] and the type of notice given. Second, the remedial measures provided by the proposed decree encompass almost the entire spectrum of types of relief typically available in employment discrimination litigation. Prompt relief is provided for five of the named plaintiffs, minority hiring and more regularized hiring practices are imposed, damages and counsel fees are

awarded and the settling defendants agree to be bound by whatever seniority modification comes out of the current Local 3 litigation.

From both the face of the agreement and the reaction of the class, it seems clear that this settlement provides plaintiffs with a highly desirable recovery from these defendants, and that however great or minimal the expense and risk attendant upon a full trial on the merits, plaintiffs have substantially achieved their goals without being subjected to those burdens. Finally, the Court notes that settlement was reached only after extensive discovery by both sides, and that there has been no allegation and certainly no evidence of collusion by counsel.

The settlement decree includes an uncontested award to plaintiffs' attorney of $47,500 for both legal fees

and expenses. No class member has objected to this award. To date, however, plaintiffs' counsel has not provided the Court with records of his hourly rate, time spent and expenses incurred. There is thus no basis for the Court to determine whether the award is reasonable under the circumstances. The Court awaits submission of the requested information before deciding whether to approve this part of the settlement. We proceed in this piecemeal fashion because, at oral argument, counsel for the Garden informed the Court that ten laborers were to be hired in the near future, and that the Garden would be reluctant to adopt the minority hiring provided in the settlement if it were not under a Court decree.

In the Court's view, the four classes involved herein will receive

benefits from this settlement at least commensurate with any they could reasonably have expected from a full trial. There is no evidence of possible prejudice to absent class members, all of whom have been notified and given the opportunity to object. Accordingly, the motion for approval of the settlement is granted, except as to the application for counsel fees. That application will be considered after the plaintiffs' counsel's affidavit is received.

SO ORDERED.

Dated: New York, New York
October 23, 1979

_____

U.S.D.J.

FOOTNOTES

1/ The Local 3 trial was bifurcated into a liability and a remedial stage. The remedial proceeding is currently before this Court.

2/ Objecting class members were instructed to write to this Court.

3/ The Court notes, however, that at least insofar as the Garden defendants are concerned, plaintiffs herein could probably have established a *prima facie* violation of the employment discrimination statutes based on the facts adduced during the Local 3 trial.

4/ The combined membership of all four plaintiff classes was 194.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK ------x

HENRY INGRAM, JAMES BRITT, WILLIAM MOODY, and ROY T. FLOYD, individually and on behalf of all persons similarly situated,

Plaintiffs,

-and-

FRANCES WILLIAMS, EDWARD MILON, HORACE MITCHELL, HERBERT BRUTON, JOVINO GARCIA,

Intervenors,

-against-

MADISON SQUARE GARDEN CENTER, INC., MADISON SQUARE GARDEN CORPORATION, ALLIED MAINTENANCE CORPORATION, ALLIED PUBLIC EVENTS SERVICE CORPORATION, and LOCAL # 3 I.B.E.W.,

Defendants. ------x

76 CIV 5870 (LBS)

#49433

OPINION

SHELLY L. ANDERSON, JAMES L. PERRY, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

MADISON SQUARE GARDEN CENTER, INC., MADISON SQUARE GARDEN CORPORATION, ALLIED MAINTENANCE CORPORATION, ALLIED PUBLIC EVENTS SERVICE CORPORATION, LOCAL 3 I.B.E.W., LOCAL 54, SERVICE EMPLOYEES INTERNATIONAL UNION,

Defendants. ------x

78 CIV 1453 (LBS)

APPEARNCES: (See last page)

SAND, D.J.

On October 3, 1979, this Court held that the manner in which Local #3, International Brotherhood of Electrical Workers ("Local 3") referred workers to Madison Square Garden ("the Garden") for employment as "laborers" violated both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 20003 (1970) and the Civil Rights Act of 1866, 42 U.S.C.C. § 1981 (1970).[1/] The Court found that the plaintiffs in the first of these two consolidated class actions,[2/] the "Ingram" plaintiffs, were entitled to recover under § 1981 only, while plaintiffs in the second action, the "Anderson" plaintiffs, were entitled to recover under both Title VII and § 1981.[3/] Pursuant to the Court's initial decision to bifurcate the trial into a liability and a remedial

stage, a hearing on all remedial issues was held on October 17, 1979, and both parties submitted briefs shortly thereafter.

Plaintiffs seek an injunction ordering Local 3 to regularize its referral practices[4/] and to refer to the Garden "in order of their current seniority" those class members who desire a laborer's position. Plaintiffs also seek full backpay for all class members who unsuccessfully applied for the job of laborer or who would have applied but for their belief that such application would be futile. Finally, plaintiffs seek an injunction ordering Local 3 to credit all class members who become laborers with full seniority for all purposes for the same number of years that they worked as cleaners at the Garden. Reasonable attorneys' fees and costs are also sought.

The Court finds that, as a general matter, an award of backpay, retroactive seniority and attorneys' fees is appropriate here. The case will now be referred to Magistrate Leonard A. Bernikow (or such other Magistrate as he shall designate) as Special Master under F.R.Civ.P. 53 who, in accordance with the general guidelines set forth below, will make recommendations to the Court as to both the entitlement of individual class members to such relief and the amount appropriate chargeable to defendant for attorneys' fees and costs.[5/] Plaintiffs' request for prospective injunctive relief is granted as modified herein.

I. Retroactive Seniority

When a court finds that an employer or union has engaged in a policy of unlawful employment dis-

crimination, class action plaintiffs are not required to introduce specific evidence of individual acts of discrimination at the remedial stage of the proceeding. The proof supporting the finding of liability in such a case also "supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 361-2 (1977). Where such a policy is found to exist, the Supreme Court has made clear that, as a general matter, the District Court must ordinarily grant seniority relief, absent reasons for denying such relief which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination and making persons whole for injuries

suffered. Teamsters v. United States, 431 U.S. at 365; Franks v. Bowman Transport Co., 424 U.S. 747, 771 (1976). Since defendant Local 3 has made no argument that such reasons exist here and since this Court has already found that Local 3 engaged in a policy of unlawful employment discrimination, the Court now concludes that an award of retroactive seniority is appropriate. This, however, does not necessarily mean that each class member is entitled to such relief. Only actual victims of Local 3's discriminatory referral practices are entitled to retroactive seniority. Teamsters v. United States, 431 U.S. at 371-372.

There are two means by which class members can demonstrate that they are actual victims. The first is for a class member to prove that he or she actually applied to Local 3 for referral

to the Garden as a laborer. Once such an application is established, there is a presumption that the class member involved is entitled to retroactive seniority, and the burden is on the union to show that its failure to refer was for non-discriminatory reasons. Teamsters v. United States, 431 U.S. at 362. In this case, however, Local 3's referral practices made a formal application for reference to the Garden impossible: there was simply no established application procedure, and union officials deliberately frustrated informal attempts by class members to secure a laborer's position. See Op. at p. 7-9; 9-10. A liberal construction of the term "application" is thus called for if class members are to be restored to their "rightful place" in the seniority scheme. See Acha v. Beame, 570 F.2d

57 (2d Cir. 1978); James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977). Accordingly, any expression by a class member to a Local 3 official evidencing a desire either to become a laborer or to acquire information as to how to obtain a referral will be treated as an "application" for purposes of determining whether that class member was an "actual victim" of Local 3's discriminatory employment practices. To do less would penalize plaintiffs for union referral procedures and record-keeping practices which have already been condemned by this Court as violative of the employment discrimination laws. See E.E.O.C. v. Local 38 of the Sheet Metal Worker's International Assoc., 532 F.2d 821, 832 (2d Cir. 1976); Carter v. Shop-Rite Foods, Inc., 470 F.Supp. 1150 (N.D. Tex. 1979) (lack of formal application procedure was itself a tool of discrimination.

Absent an application as defined above, a second and more difficult way for class members to demonstrate that they were actual victims of Local 3's discriminatory referral practices is to prove that they were qualified for a laborer's position and that they would have applied for a referral had it not been for those practices. Teamsters v. United States, 431 U.S. at p. 368 (referring to the non-applicants' "not always easy burden".) In this case, the Court has already found that the atmosphere at the Garden was such that class members could reasonably have believed that seeking a referral from Local 3 would be futile. See Op. at p. 10. Such a finding, while essential to the nonapplicants' case, does not mean that all nonapplicants who now seek laborers' positions are entitled to retroactive seniority. Teamsters v. United States, 431 U.S. at p. 369-371.

Each such nonapplicant must come forward with evidence that he or she desired a laborer's job, possessed the requisite qualifications, and would have sought a referral but for the Union's discriminatory practices. Evidences of a class member's desire to become a laborer may consist of an informal inquiry or expression of interest to someone other than a Local 3 official,[6/] or even an "unexpressed desire credible and convincing." Teamsters v. United States, 431 U.S. at p. 371, n. 58. See, e.g., United States v. East Texas Motor Freight System, Inc., 20 EPD ¶ 30, 103 (N.D.Tex. 1979) (making individual retroactive seniority determinations for nonapplicants). The question is a factual one, but if a change from cleaner to laborer would have entailed a loss of seniority at the time[7/] the class member involved desired such a change, then whether that

class member would have accepted a laborer's position at that time despite the loss of seniority is a relevant if not determinative consideration. See Teamsters v. United States, 431 U.S. at p. 370-371.

Although plaintiffs seek full seniority for the number of years that qualifying class members who become laborers worked at the Garden, no class member may be given retroactive seniority to a date earlier than the effective date of Title VII or the date of his application or proven "desire", whichever is later.[8/] Teamsters v. United States, 431 U.S. at p. 356-357. Thus, an applicant or nonapplicant who qualifies for seniority relief under the standards set out above will be granted retroactive seniority as of the date of the next laborer hire resulting from a Local 3 referral which followed the class member's application

or qualifying desire, subject to a maximum date of July 2, 1965. See, e.g., Harper v. General Grocers Co., 590 F.2d 713 (8th Cir. 1979); Sagers v. Yellow Freight System, Inc., 529 F.2d 721 (5th Cir. 1976); Linebaugh v. Auto Leasing Co., 18 EPD ¶ 8, 904 (W.D.Ky. 1978) (retroactive seniority awarded "as of date [plaintiff] should have been employed by defendant", i.e., as of date of next hire following her application). The source and date of laborer hires should be drawn from the books and records of the employer and the evidence adduced at trial, but there is a strong presumption that most if not all laborer hires were the result of a Local 3 referral. See Op. at p. 7-9. Evidence of applications of the "desire" and qualifications of nonapplicants may be drawn from the testimony at trial, from depositions, interrogatories and other documents admitted into evidence, and,

if necessary, from testimony at hearings held before the magistrate.[9/] Evidence of the union's nondiscriminatory reasons for its failure to refer individual class members should also be presented to the magistrate.[10/]

Although this procedure for identifying actual victims of Local 3's discriminatory practices and restoring them to their "rightful place" will "necessarily involve a degree of approximation and imprecision", the Court believes that it is both well within its broad equitable powers under Title VII to fashion the most complete relief possible and consistent with the Supreme Court's specific mandate to "recreate [as nearly as possible] the conditions and relationships that would have been had there been no unlawful discrimination". Teamsters v. United States, 431 U.S. at p. 372 (quoting Franks v. Bowman Transport Co., 424 U.S. at p. 769). See also, Acha v. Beame, supra;

James v. Stockham Valves & Fittings Co., supra (under "rightful place" doctrine, sufficient retroactive seniority is given to permit the advancement and layoff protection the victim of the discrimination would have enjoyed but for the discrimination).

Finally, while the Ingram plaintiffs are entitled to recover under § 1981 and not under Title VII, the Court notes that the two statutes have generally been similarly interpreted and applied, see, e.g., Carrion v. Yeshiva University, 535 F.2d 722 (2d Cir. 1976), and sees no reason why successful § 1981 plaintiffs should not be eligible for a retroactive seniority award. See Williams v. DeKalb County, 577 F.2d 248 (5th Cir. 1978) back-pay award appropriate in a § 1981 suit). Accordingly, the Ingram plaintiffs' individual entitlements to retroactive seniority will be determined in accordance with the

standards set forth above, including the maximim seniority date of July 2, 1965. See Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1374-75, 1378-79 (5th Cir. 1974) (limiting the availability of back-pay relief under § 1981 to the effective date of Title VII). As the Fifth Circuit stated in Johnson, the "balancing of the equities" in the employment discrimination area suggests that backpay relief under § 1981 should be limited to the effective date of Title VII, and this Court believes that the same rule should govern an award of retroactive seniority. Any other conclusion would be particularly unfortunate in this case since two essentially identical plaintiff classes would then be eligible for different measures of relief after having suffered from the same discriminatory practices.

II. Backpay

Much of what has already been said about retroactive seniority applies to backpay as well.[11/] The standard for general availability is identical in both contexts; indeed, that standard was first adopted by the Supreme Court in a backpay decision. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1974). The standard for determining the eligibility for backpay of individual "applicant" class members is also the same as that employed in the retroactive seniority context.[12/] See, e.g., Hill v. Western Electric Co., 596 F.2d (4th Cir. 1979); Mitchell v. Mid-Continent Spring Co., 583 F.2d 275 (6th Cir. 1977); Chewning v. Schlesinger, 471 F.Supp. 767 (D.C.D.C. 1979). The questions which require extended separate discussion are whether nonapplicants are eligible for backpay relief, the effect of the statute of limitations, the composition of a backpay

award, and the availability of front pay. The Court notes before addressing those questions, however, that since defendant has pointed to no reason for denying backpay relief which, "if applied generally, would not frustrate" the purposes of the employment discrimination laws,[13] a backpay award is, as a general matter, appropriate here.[14]

Although the Supreme Court opinion in Teamsters v. United States, supra, was not concerned with backpay, courts confronted with the question since Teamsters have held that "nonapplicants" are potentially eligible for a backpay award, and have applied Teamsters eligibility standards to the backpay area. See, e.g., Hill v. Western Electric Co., supra; Mitchell v. Mid-Continent Springs Co., supra; Carter v. Shop-Rite Foods, Inc., supra; Chewning v. Schlesinger, supra. This approach seems consistent with the parallel treatment

generally accorded the two remedies by both the Supreme Court and the lower federal courts. Compare Teamsters v. United States, supra, with Albemarle Paper Co. v. Moody, supra. Moreover, the Teamsters Court's concern that imposing an absolute bar on relief to nonapplicants would "put beyond the reach of equity the most invidious effects of employment discrimination" is equally applicable here. Teamsters v. United States, 435 U.S. at p. 365, 367. That language at least suggests that limiting the type of relief available to a victim of discrimination because he is a nonapplicant would be inconsistent with the duty of the courts to secure "complete justice" and provide a "make whole" remedy for such victims. Id. at 364. The Court thus concludes that backpay relief is available to nonapplicants, and that the standards set out in Teamsters v. United States, supra, and described above

are to be used in making individual eligibility determinations.[15]

Unlike an award of retroactive seniority which is subject only to the maximum recovery date of July 2, 1965, backpay awards are also subject to a statute of limitations. Title VII specifically provides that "[b]ackpay liability shall not accrue from a date more than two years prior to the filing of a charge with" the E.E.O.C. 42 U.S.C. § 2000e-5(g).[16] Thus, the Anderson plaintiffs' backpay award is actually subject to a maximum recovery date of November 24, 1973, which is two years before their charge naming Local 3 was filed with the Commission.[17] The Ingram plaintiffs, whose backpay recovery is based on § 1981 rather than Title VII,[18] are subject to the applicable state limitations period, Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1974), which in New York is three years prior to the time

the lawsuit was commenced. See Cates v. Trans-World Airlines, Inc., 561 F.2d 1064, 1067 n. 4 (2d Cir. 1977). The maximum recovery date for the Ingram plaintiffs is thus May 20, 1974, three years before their complaint in this action was amended to include Local 3 as a defendant.

In calculating the amount appropriate for individual backpay awards, the magistrate should take into account, in addition to wages, fringe benefits such as insurance, pension benefits and vacation and sick pay, as well as overtime pay and shift differentials. See, e.g., Pettway v. American Cast Iron Pipe Co., supra; Farmer v. United Catering, 19 EPD ¶ 9,075 (E.D.Mich. 1978) (including such items in a backpay award against a union). From this amount must be deducted the amount earned as a cleaner between the time of the individual class member's recovery date and the backpay termination date.

42 U.S.C. § 2000e-5(g). The backpay termination date in this Circuit is the date of the "actual remedying of the discrimination", i.e., the date on which the class member involved becomes a laborer. E.E.O.C. v. Enterprise Association of Steamfitters, 542 F.2d at 590 (mandating such a cutoff date for a backpay award against a union). This approach, which has been referred to as a "front pay" award in other circuits, see, e.g., United States v. Leeway Motor Freight, supra; White v. Carolina Paperboard Corp., 564 F.2d 1073, 1091 (4th Cir. 1977) (backpay to be continued until class members attain rightful place), is particularly appropriate here since the Garden's seasonal hiring practices suggest that it may be some time before all qualifying clas members actually become laborers. See, e.g., Ivey v. Western Electric Co., 16 EPD ¶ 8, 299 (N.D.Ga. 1978). If, as is likely, front pay awards

are to be made to some class members, the magistrate may either recommend a procedure by which the Court will retain jurisdiction until all qualified class members have attained their rightful place in order to make periodic front pay adjustments, see Ivey v. Western Electric, supra, or supplement the backpay award by an amount equal to the estimated present value of lost earnings that are reasonably likely to occur between the final decree and the time when the class member involved can assume a laborer's position. White v. Carolina Paperboard, 564 F.2d at p. 1,091. See also, United States v. Leeway Motor Freight, supra; James v. Stockham Valves & Fittings Co., supra.

Once the above described calculations have been completed, the magistrate may award interest to qualified class members for past earnings lost as a result of the discrimination. See, e.g., Pettway

v. American Cast Iron Pipe Co., supra; Kinsey v. Leq Mason Wood Walker, Inc., 16 EPD ¶ 8,168 (D.C.D.C. 1978), affirmed, 21 EPD ¶ 30,292 (D.C.Cir. 1979).

Finally, the Court notes that since the consent decree entered into between plaintiffs and the Garden and Allied defendants provides for a monetary award, Local 3 will not be held accountable for the total backpay figure resulting from the backpay calculations discussed above. Whether the amount provided for in the consent decree will be subtracted from the total backpay figure, with the union liable for the remainder, Farmer v. United Catering, supra, or whether the union will be held liable for a portion of the total figure, with the remainder attributed to the consent decree, Myers v. Gilman Paper Co., 544 F.2d 837 (5th Cir. 1977); Stevenson v. International Paper Co., 14 EPD ¶ 7,615 (W.D.La. 1977), will be determined

by the Court after the magistrate submits his report. But see, United States v. East Texas Motor Freight System, Inc., 564 F.2d 179 (5th Cir. 1977) (upholding a district court's denial of a backpay award against a union on the ground that plaintiffs were "fully compensated" by the monetary award contained in a consent decree between plaintiffs and their employer). The magistrate's report should include a recommendation for the total backpay figure, as well as for the amounts owing individual class members.

III. Prospective Relief

The prospective relief sought here poses none of the complicated and sensitive questions which confront a court asked to establish hiring goals or quotas.[19/] See, e.g., Rios v. Enterprise Association Steamfitters Local #638, 501 F.2d 622 (2d Cir. 1974). Once a violation of either Title VII or § 1981 is established,

regularizing of employment or referral practices to remedy the vestigates of past discrimination is well within the broad equity power of the trial court. 42 U.S.C. § 2000e-5(g). See United States v. Wood, Wire & Metal Lathers International Union, 71 F.2d 408 (2d Cir. 1973) ("the only limitation on the broad powers of affirmative relief is that restricting preferential quota hiring"); Stamps v. Detroit Edison Co., 17 EPD ¶ 8,583 (E.D.Mich. 1978) (ordering defendants to notify class members of their rights under a remedial order by mail). Accordingly, plaintiffs' request that Local 3 be ordered to maintain a referral "register" and to post notices in the Garden of how to apply for a referral is granted. Defendant is ordered to submit to the magistrate for his approval a plan for the establishment of referral lists and copies of the proposed notices to be posted in the Garden.

Finally, plaintiffs' request that class members be referred to the Garden in order of their "current seniority" is granted only until such time as retroactive seniority dates have been established. After that time, and after the five class members named in the consent decree have obtained laborers positions, Local 3 is ordered to refer class members to the Garden under the terms of the consent decree in the following order: first, applicants or qualified nonapplicants who now seek a laborer's position in order of their retroactive seniority date, i.e., those with the earliest retroactive seniority date should be referred first; second, once this first group of class members has been placed, the remaining class members should be referred in the order that they seek a referral. Where more than one class member in this second group applies for a referral at the same time, they should then

be referred in order of their current seniority as cleaners. In the Court's view, this approach recreates the conditions that would have existed but for the discrimination more accurately than would the approach suggested by plaintiffs.

IV. Attorneys' Fees & Costs

Reasonable attorney's fees and costs may be allowed the prevailing party in employment discrimination suits under either Title VII or § 1981. See 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988. The standard for determining the amount of such fees is the same under both statutes, and although a fee award is committed to the discretion of the trial court, prevailing plaintiffs in civil rights actions generally recover fees and costs absent special circumstances which would make such an award unjust. See Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978); Mid-Hudson Legal Services, Inc. v. G & U, Inc., 578

F.2d 34, 37 (2d Cir. 1978). In this case, defendant's liability has been established and a judgment will ultimately be entered which will both change Local 3's referral practices and provide individual relief for members of the plaintiff classes. There is thus no doubt that plaintiffs' claims were meritorious and that plaintiffs are the "prevailing party" entitled under the appropriate statutes to recover reasonable attorneys' fees. 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988.

Since Allied and the Garden were initially parties to this litigation, it will be necessary to determine what portion of plaintiffs' fees and costs are chargeable to Local 3. Currently pending before this Court for its approval is an application for a fee award, contained in the consent decree, in connection with legal services performed by plaintiffs' attorney until the time of settlement with

Allied and the Garden. In a forthcoming opinion, the Court will determine a reasonable fee award for all such services. However, it is clear that since the three defendants were, until settlement, part of the same consolidated action, these legal services were performed in connection with plaintiffs' claims against all defendants. The Court thus finds that Local 3 shall be liable for one-third of plaintiffs' legal costs incurred from the commencement of this action until the time of settlement, exclusive of any costs incurred by plaintiffs in settlement negotiations to which Local 3 was not a party. See Rogers v. International Paper Co., 510 F.2d 1340, modified on other grounds, 526 F.2d 722 (8th Cir. 1975); Sagers v. Yellow Freight Systems, Inc., 529 F.2d 721 (5th Cir. 1976); Bush v. Lone Star Steel Co., 373 F.Supp. 526 (E.D.Tex. 1974). The additional fees

incurred as a result of the trial in which only Local 3 was involved, as well as all fees incurred during the remedial phase of this litigation, must necessarily be borne by Local 3 alone.

The standards for computing a reasonable fee award have been set out in this Circuit in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974). After a "lodestar" figure has been calculated, the Magistrate may consider additional subjective factors in increasing or decreasing the amount of the fee. City of Detroit, 495 F.2d at 471. Moreover, in an appropriate case, the not-for-profit character of the defendant against whom an award is granted may be considered in adjusting the fee. See Rios v. Enterprise Association Steamfitters Local 638, 400 F.Supp. 993, (S.D.N.Y. 1975), aff'd sub nom. E.E.O.C. v. Enterprise Association Steamfitters Local 638, 542 F.2d 579 (2nd Cir. 1976), cert. denied, 430 U.S. 911 (1977).

The Court notes, however, that any deviation in amount from the "lodestar" fee award figure in recognition of such factors must be supported by specific factual findings indicating the basis for the deviation. City of Detroit, 495 F.2d at 471.

To arrive at a fee award which is reasonable under all the circumstances, the magistrate must be presented with time logs or affidavits detailing the number of hours spent and identifying the attorneys and activities involved. Distinctions between time spent in court and time attributed to research, administrative and related services may be appropriate in fixing a reasonable hourly rate. See Firebird Society v. Members of the Board of Fire Commissioners, 556 F.2d 642 (2d Cir. 1977). Care should be taken to avoid awarding fees for duplicated services and unnecessary expenditures of time. See Gagne v. Maher, 594 F.2d 336

(2d Cir. 1979); Reynolds v. Coomey, 567 F.2d 1166 (1st Cir. 1978). If the time logs and other supporting documents are sufficiently detailed, they may provide an appropriate basis for determination of a reasonable fee. Rios, 400 F.Supp. at 996. If there are disputes of fact over the elements that comprise the fee award, however, or if there are "factual voids" in the information presented, an evidentiary hearing is "imperative" before an adequate fee can be fairly determined. City of Detroit, 495 F.2d at 473.

V. Conclusion

The case is now referred to the magistrate for further proceedings consistent with the guidelines set forth herein. During the course of those proceedings, issues not dealt with in this opinion will undoubtedly arise. The Court does not in any way intend to preclude

consideration of such issues by the magistrate who, of course, will have full authority to make recommendations with respect to those issues in light of this opinion.

Settle order on notice.

Dated: New York, New York
December 13, 1979

U.S.D.J.

FOOTNOTES

1/ The other defendants in these actions entered into a consent decree with plaintiffs which was approved by this Court in an opinion dated October 23, 1979. The factual and procedural background of this litigation is described in the Court's October 3, 1979 opinion (hereafter "Op.").

2/ The four plaintiff classes involved here together compromise all black and hispanic persons who have been or will in the future be employed as "cleaners" at the Garden. See Op. at p. 2

3/ The Ingram plaintiffs' Title VII claims against Local 3 were dismissed after the plaintiffs' counsel conceded that they were barred by the failure of the Ingram plaintiffs to name Local 3 in the original E.E.O.C. proceeding. Op. at n.3. Claims by both the Ingram and Anderson plaintiffs under the Civil Rights Act of 1871, 42 U.S.C. § 1985 (1970), were dismissed in accord with the Supreme Court's recent decision in Great American Federal Savings & Loan Assoc. v. Novotny, 20 EPD ¶ 30,004 (1979). See Op. at p. 10-11.

4/ Specifically, plaintiffs seek an injunction ordering Local 3 to allow class members to register with Local 3 for referral to the Garden as laborers, and to maintain a list of those class members seeking a referral. The union would also be required to post conspicuously within the Garden notice of how to register on said referral list.

5/ Reference to a master or magistrate for such purposes during the remedial stage of employment discrimination litigation is common. See, e.g., United States v. Lee Way

Footnotes continued...

Motor Freight, 21 EPD ¶ 30,286 (10th Cir. 1979) (backpay award, special master); E.E.O.C. v. Enterprise Association Steamfitters Local #638, 542 F.2d 579 (2d Cir. 1976) recommending reference of individual backpay claims to a special master); Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975) (retroactive seniority award, special master); United States v. Masonry Contractors Association, 497 F.2d 871 (6th Cir. 1974) (backpay award, magistrate as special master); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) (backpay award, special master). As it has done throughout the course of these proceedings, the Court encourages resolution of this controversy by means more efficient, economical and expeditious than a continuation of this litigation. Our reference to a magistrate as a special master is not intended to preclude any suggestions the parties might care to make promptly to the Court, on consent, of any alternative procedure or master.

6/ An inquiry or expression of interest to a Local 3 official should be treated as an "application". See discussion of applicants, supra.

7/ Whether this was the case, and whether the situation was the same or different when cleaners were employed by the Garden as opposed to being employed by defendant "Allied", see Op. at p. 4, is not clear from the record now before the Court. These are matters which should be considered by the magistrate.

8/ The same limitation date applies regardless of whether an individual class member is recovering under Title VII or § 1981 or both. See discussion infra.

Footnotes continued...

9/ The Court finds credible the trial testimony of class members who described their efforts to obtain a laborer's position by speaking to the Local 3 shop steward or other union personnel, and the magistrate is instructed to find, subject to rebuttal evidence by the defendant, that those class members are eligible for retroactive seniority. As to the remaining class members seeking similar relief, the Court has been informed by plaintiffs' counsel that much of the information needed to make individual eligibility determinations is contained in depositions or interrogatory responses, some of which have not been admitted into evidence. While the magistrate may certainly rely on everything which has been admitted, information not admitted should be considered by the magistrate only if properly admitted in the further remedial stage of this litigation. Oral testimony before the magistrate may be desireable in any event since credibility determinations may play a critical role in individual eligibility decisions, particularly in the case of nonapplicants.

10/ In dealing with the seniority remedy, the magistrate should consider and report to the Court as to whether a "competitive" (layoff protection) v. "noncompetitive" (vacation time) seniority distinction is possible here and whether, in light of the history of the employment structure at the Garden, see Op. at at p. 4-6, cleaners who become laborers should maintain full seniority for noncompetitive purposes for the number of years they worked at the Garden as cleaners.

11/ This is true for the backpay claims under both Title VII and § 1981, which will be treated together here except for the statute of limitations discussion. The backpay remedy is available under § 1981. Williams v. DeKalb County, supra.

Footnotes continued...

12/ The discussion in the retroactive seniority section of this opinion of the union's evidentiary burden, the construction of the term "application", the maximum date and the evidence to be considered by the magistrate, is all equally applicable here.

13/ The Court notes too that the kind of factors which led the Supreme Court to reject a backpay award in City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) are simply not present here.

14/ This conclusion is not foreclosed by the fact that the defendant is a union, and that a backpay award may have serious financial consequences. E.E.O.C. v. Enterprise Association Steamfitters Local #638, 542 F.2d 579, 585-586 (2d Cir. 1976). The Court defers until after the Magistrate submits his report, however, the question of the weight to be given to those considerations. Id. at 586 & 592.

15/ In E.E.O.C. v. Enterprise Association Steamfitters Local #638, 542 F.2d 579 (2d Cir. 1976), a pre-Teamsters decision, the Second Circuit held that backpay relief is not available to nonapplicants. Explicitly distinguishing between an award of retroactive seniority to nonapplicants and an award of backpay, the Court focused on the economic burden to the defendant and the far greater number of potential claimants since backpay relief is not limited to those who are still employed by the parties involved. Id. at 588. See also, E.E.O.C. v. Local 28 of the Sheet Metal Workers' International Association, 532 F.2d 821, 832 (2d Cir. 1976). Although such factors may be relevant when determining whether a court, in its discretion, should award backpay relief, they cannot in light of Teamsters support a per se prohibition of such relief to nonapplicants. In

Footnotes continued...

any case, the number of class members claiming backpay in the case now before the Court (43) is only slightly greater than the number who seek retroactive seniority (37).

16/ This two year limitation period, adopted as part of the 1972 amendments to Title VII, applies to all charges pending before the E.E.O.C. on March 24, 1972 and all charges filed thereafter.

17/ The Anderson plaintiffs' backpay relief is granted under Title VII, which, under these circumstances, provides them with an earlier maximum recovery date than § 1981. See discussion, infra.

18/ See note 3, supra.

19/ Minority hiring goals are included in the consent decree entered into between plaintiffs and the Garden and Allied defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HENRY INGRAM, JAMES BRITT, WILLIAM MOODY, and ROY T. FLOYD, individually and on behalf of all persons similarly situated,

Plaintiffs,

-against-

FRANCES WILLIAMS, EDWARD MILON, HORACE MITCHELL, HERBERT BRUTON, JOVINO GARCIA,

Intervenors,

-against-

MADISON SQUARE GARDEN CENTER, INC., MADISON SQUARE GARDEN CORPORATION, ALLIED MAINTENANCE CORPORATION, ALLIED PUBLIC EVENTS SERVICE CORPORATION, and LOCAL # 3 I.B.E.W.,

Defendants.

76 CIV 5870 (LBS)

O P I N I O N

SHELLY L. ANDERSON, JAMES L. PERRY, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

MADISON SQUARE GARDEN CENTER, INC., MADISON SQUARE GARDEN CORPORATION, ALLIED MAINTENANCE CORPORATION, ALLIED PUBLIC EVENTS SERVICE CORPORATION, LOCAL 3, I.B.E.W., Local 54, SERVICE EMPLOYEES INTERNATIONAL UNION,

Defendants.

78 CIV 1453 (LBS)

APPEARANCES: (See last page)

SAND, J.,

This is the latest Opinion in a case which has spawned numerous Opinions. Although the background of this litigation has been summarized in these prior Opinions of the Court, a general restatement of the factual context of this case is appropriate at this concluding stage of the proceedings. For a more detailed discussion of the facts of this case, see Ingram v. Madison Square Garden Ctr., Inc., 482 F.Supp. 414 (S.D.N.Y. 1979).[1/]

Two separate cases were brought by two classes, which together comprise all black and Hispanic persons who have been or will in the future be employed as "cleaners" by the defendants Madison Square Garden Center, Inc. ("Center, Inc."), Madison Square Garden Corporation ("Garden Corp."), Allied Maintenance Corporation ("AMC"), and Allied Public Events Service

Corporation ("Allied"). Local #3, International Brotherhood of Electrical Workers ("Local 3", "the union," "the defendant") was also named as a defendant in these actions.

Plaintiffs allege that the defendant violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 20003 et seq., and the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981 and 1985 respectively, by engaging in a pattern of hiring and employment practices which made it impossible for class members to secure the higher paying and generally more desirable position of "laborer" at Madison Square Garden ("the Garden"). Prior to the trial, Center, Inc., Garden Corp., AMC and Allied all entered into a proposed Consent Decree which was subsequently approved by the Court. See Ingram, 482 F.Supp. 426 (S.D.N.Y. 1979). The consolidated trial of the two actions was limited to the

issue of Local 3's liability under the employment discrimination statutes involved.

In its Opinion of October 3, 1979, the Court dismissed the plaintiffs' § 1985 claims and dealt with the various jurisdictional and statute of limitations issues which the defendant interposed as defenses. See Ingram, 482 F.Supp. 414 (S.D.N.Y. 1979). The Court held that the manner in which Local 3 referred workers to the Garden for employment as laborers violated both Title VII and § 1981. The Court agreed with the plaintiffs' contention that the union, which is the bargaining agent for the laborers at the Garden, and which referred prospective employees to the Garden for employment as laborers, employed a completely subjective and standardless referral policy, relying almost entirely on word of mouth favoritism, that operated to discriminate

against class members by preventing them from becoming laborers. The Court found that the plaintiffs in the first of the two consolidated class actions, the "Ingram" plaintiffs, were entitled to recover under § 1981 only, while the plaintiffs in the second action, the "Anderson" plaintiffs, were entitled to recover under both Title VII and § 1981.

On December 13, 1979, the Court filed an Opinion establishing guidelines with respect to damages, and found that, as a general matter, awards of backpay, retroactive seniority, and attorneys' fees are appropriate in this action. See Ingram, 482 F.Supp. 918 (S.D.N.Y. 1979). Plaintiffs' request for prospective injunctive relief was granted, subject to certain modifications. The Court explained that class members could demonstrate that they are actual victims by proving a desire for referral as a laborer which was

expressed to Local 3 or, alternatively, by proving that they were qualified for a laborer's position and that they would have applied for a referral had it not been for the discriminatory practices. See id. at 922-23. The case was referred to Magistrate Kent Sinclair, Jr. who, in accordance with the general standards outlined in the Opinion, was requested to make recommendations to the Court as to both the entitlement of individual class members to relief and the amount appropriately chargeable to the defendant for attorneys' fees and costs.

On April 18, 1980, the Magistrate issued "Preliminary Findings" as to retroactive seniority dates for class members who had obtained laborers' positions. These findings were affirmed by this Court on May 5, 1980 without prejudice to such review as the Court should choose to make at the end of the remedial process.

See Ingram, Nos. 76-5870, 78-1453 (S.D.N.Y. May 5, 1980).

On November 21, 1980, the Magistrate issued "Findings of Fact" concerning the desire dates and other eligibility determinations respecting seniority for those class members who had come forward to request affirmative relief.

On December 8, 1980, Magistrate Sinclair issued an "Interim Order on Monetary Relief" containing a discussion of the backpay formula adopted therein and a summary of the status and expected treatment of open items in connection with the relief aspects of the litigation. The method of computing wage loss which the Magistrate adopted involved comparing each victim's actual compensation with the average compensation of an appropriate group of comparison laborers during the period of discrimination.

The Magistrate issued "Findings,

Conclusions and Recommendations on Back Pay" on July 27, 1981, which contained his final recommendations with respect to relief other than attorney's fees. This report offered resolutions to the remaining remedy issues and proposed specific monetary awards for those class members who were found to be victims of Local 3's discriminatory referral policy.

On October 23, 1981, the Magistrate issued a "Report Containing Findings and Recommendations Re Plaintiffs' Fee Application." On November 10, 1981, the Magistrate filed two final Orders, one recommending a specific amount for attorneys' fees, and the other denying the defendant's motion to reopen the record.

All objections to Magistrate Sinclair's findings and recommendations have been deferred until the conclusion of the proceedings before the Magistrate. Both the plaintiffs and the defendant

have now submitted such objections pursuant to 28 U.S.C. § 636(b) and the United States District Court for the Southern District of New York Rules for Proceeding Before Magistrates, Rule 7.

Before discussing these exceptions to the Magistrate's reports, we address the question whether the legal standard for a finding of § 1981 liability has changed since the Court found Local 3 liable under that statute in 1979. The Court will next consider defendant's motion to reopen the record in this action.

Legal developments since the time this Court issued its Opinion of October 3, 1979 require a further elaboration of the finding of liability under § 1981. Currently pending before the Supreme Court of the United States is a case which squarely poses the heretofore unsettled question of whether the establishment of a prima facie case of a § 1981 violation

requires a showing of the defendant's intent to discriminate. See Guardians Ass'n of New York City v. Civil Service Commission of the City of New York, cert. granted 50 U.S.L.W. 3547 (January 11, 1982). Most of the courts which have recently addressed this issue, including the Court of Appeals for the Second Circuit, have concluded that a § 1981 plaintiff must prove purposeful discriminatory intent. See, e.g., Guardians Ass'n of New York City v. Civil Service Commission of the City of New York, 633 F.2d 232 (2d Cir. 1980), cert. granted 50 U.S.L.W. 3547 (January 11, 1982); Crawford v. Western Electric Co., Inc., 614 F.2d 1300, 1309 (5th Cir. 1980); Mescall v. Burrus, 603 F.2d 1266 (7th Cir. 1979); Des Vergnes v. Seekonk Water District, 601 F.2d 9, 15-16 (1st Cir. 1979). The Court of Appeals for the Second Circuit concluded that "[o]bjectively

viewed, the language, structure and history of § 1981 all point to the conclusion that the statute was simply intended to prohibit purposeful racial discrimination in a wide variety of circumstances, including but not limited to employment discrimination." Guardians Ass'n, supra, at 267 (emphasis added).

As was indicated in this Court's original liability Opinion, plaintiffs have met their burden of proof even under the heightened standard requiring a showing of discriminatory motive. Ingram, 482 F.Supp. 414, 425 (S.D.N.Y. 1979). The statistical disparity between the percentage of black and Hispanic referrals and the percentage of these groups in the labor market surrounding the Garden, the standardless referral "system" employed by Local 3, the dependence on word of mouth recruitment, and the statements and demeanor of those who testified at trial, all convince

the Court that the evidence is sufficient to establish a § 1981 violation based on a standard of discriminatory intent. For these reasons and because of the already protracted nature of these proceedings, we do not defer this decision because of the pendency of the Guardians appeal.

We consider next the defendant's motion to reopen the record in this action in order to put into evidence an affidavit concerning Local 3 referrals, a document labelled "Hiring List plaintiff class as of February 18, 1981, positive responses," and a letter from Garden counsel dated August 13, 1981. The Court, after hearing oral argument on the matter, is entirely in accord with Magistrate Sinclair's statements in his Order of November 10, 1981. No acceptable reason has been advanced by the defendant as to why these documents, which have either themselves been long available or which

contain information which has long been available, could not have been the subject of a timely offer of proof. The defendant claims that some of the proferred evidence relates to its argument that the plaintiffs' § 1981 case is time barred since the Court of Appeals for the Second Circuit may, in light of developing case law, reconsider its holdings as to the statute of limitations applicable to civil rights actions, and find that it is one year instead of three years. Aside from the purely speculative nature of defendant's assertion, such evidence is irrelevant in the context of this action. The discriminatory referral policy, which is the basis of defendant's liability, was continuously adhered to during all times relevant to the defendant's argument and was not a single, isolated act as to which even a one year statute of limitations might be a bar. See Ingram, 482 F.Supp. 414, 423 (S.D.N.Y. 1979).

In light of the foregoing discussion, the Court sees no reason to reopen the record in this already protracted litigation. The defendant's motion is therefore denied.

EXCEPTIONS TO THE MAGISTRATE'S REPORTS

The plaintiffs have made seven specific objections to Magistrate Sinclair's recommendations. Defendant has objected to virtually every one of the Magistrate's numerous adverse findings and has imposed upon the Court the burden of considering many misleading characterizations of the record as well as numerous patently absurd and frivolous arguments.

The Court, after de novo review of the evidence as to all matters as to which objections were made, approves all of the Magistrate's findings and recommendations except in the two instances specifically discussed below. This Court is of the opinion that the Magistrate's

findings and recommendations have been based on an extremely thoughtful analysis of the issues presented, and a thorough and painstaking consideration of the evidence in the case. We discuss herein only those objections with respect to which further comment by the Court is deemed appropriate.

Defendant's first objection is that the proceedings before the Magistrate established the spuriousness of plaintiffs' class action. See Defendant Union's Exceptions to Magistrate Sinclair's Findings and Supporting Brief at 5-9 (hereinafter "Defendant's Objections"). Without reciting each of Local 3's characterizations of the evidence, suffice it to say that the Court adheres to its prior findings as to the validity of plaintiffs' proceeding in the form of class actions, as to Local 3's liability, and as to the reasonableness of a cleaner's

belief that it would be futile for a class member to seek a laborer referral from Local 3. The Court merely notes that a particular plaintiff's post-trial decision as to whether or not to become a laborer is in no way dispositive of that individual's desires at an earlier time.

The Court rejects the defendant's contention that it "should not be burdened with a rebuttable presumption of discrimination with respect to each claimant." Defendant's Objections at 15. Local 3's attempts to draw a distinction between the burdens that should be imposed upon a discriminatory employer and a discriminatory union are unconvincing. Once Local 3's liability has been found, it is in the position of a proved wrongdoer. The same factors which would militate in favor of a rebuttable presumption against such an employer -- e.g., probability that decisions were made pursuant to the overall dis-

criminatory pattern and superior access to proof -- are equally applicable where it is found that a union has discriminated. See Teamsters v. United States, 431 U.S. 324, 359 n. 45 (1977) (hereinafter "Teamsters").

The defendant argues that "the claimants being nonapplicants were not entitled to Retroactive Seniority." Defendant's Objections at 19. The defendant relies primarily on language from Teamsters, supra, regarding the burdens on a nonapplicant seeking relief, and partially on cases construing § 703(h) of Title VII.

The defendant's resort to § 703(h) is misplaced, since that provision only immunizes certain seniority systems from the category of "unlawful employment practice(s)," and does not prevent the award of retroactive seniority as a remedial measure for other discriminatory

practices. As the Supreme Court has stated: "There is no indication in the legislative materials that § 703(h) was intended to modify or restrict otherwise appropriate relief once an illegal discriminatory practice occurring after the effective date of the Act is proved." Franks v. Bowman Transportation Co., 424 U.S. 747, 757-62 (1976). In the case at bar, plaintiffs did not assert that the laborer seniority system in and of itself violated Title VII, but rather, plaintiffs seek retroactive seniority as a means of making persons whole for injuries they suffered.

As the defendant acknowledges, the Supreme Court explicitly stated in Teamsters:

> "We now decide that an incumbent employee's failure to apply for a job is not an inexorable bar to an award of retroactive seniority. Individual nonapplicants must be given an opportunity to undertake their difficult task of proving

> that they should be treated as applicants and therefore are presumptively entitled to relief accordingly."

Teamsters, supra, at 365-66. Local 3 asserts that the nonapplicants have not met the difficult standard of showing that they were actual victims of the discriminatory referral practices, and that the award of retroactive seniority for the plaintiffs was "lightly recommended" by the Magistrate. Defendant's Objections at 25. The Court strongly disagrees with defendant's contentions. The extensive record fully supports the Magistrate's fact findings that, with one exception, each of the nonapplicants, for whom an award is recommended, desired a laborer's job, possessed the requisite qualifications, and would have sought a referral but for the union's discriminatory practices. These nonapplicants are therefore entitled to an award of retroactive seniority.

The defendant asserts that Local 3 may only be liable in damages if its membership participated in, authorized, or ratified the actions giving rise to liability. In support of this argument, defendant cites cases involving either New York law or federal law regarding the award of punitive damages. See Defendant's Objections at 9-11, and cases cited therein. The irrelevance of these situations to the issues presently before the Court need not be belabored here. The Court sees no reason to change its view that, as a general matter, unions may be subject to backpay awards. See Ingram, 482 F.Supp. 918, 925 (S.D.N.Y. 1979).

Without directly responding to each of the defendant's objections to the Magistrate's general procedure for determining damages, this Court notes that it wholly endorses the Magistrate's

methodology. As the plaintiff correctly contends: "The Magistrate's method was fair and was designed to reconstruct, as nearly as possible, the probable work history of each claimant absent discrimination." Plaintiffs' Memorandum in Reply to Defendant's Exceptions and in Opposition to Defendant's Motion at 17 (hereinafer "Plaintiffs' Reply"). Magistrate Sinclair's choice of laborers with whom to compare the plaintiffs for backpay purposes, his creation of Groups I through V, according to seniority, his assignment of particular plaintiffs into particular Groups, and the manner in which he reduced the award for those plaintiffs who did not use reasonable diligence in mitigating damages, were carried out in a just, sensible, and entirely correct manner. Local 3's exceptions amount to no more than an assertion that if the Magistrate had been pursuing different goals, had

been presented with different facts, or had made less rational classifications or decisions, the union might have been assessed a lesser amount for backpay awards.

Local 3 posits several arguments in support of its contention that no backpay should be awarded against the union. First, the union asserts that this Court's pretrial approval of a backpay settlement made by plaintiffs and the other defendants indicates that plaintiffs have received total fair recompense for their injuries and should not be permitted to recover additional sums from Local 3. The Court is still of the opinion that the settlement provided the plaintiffs with a fair recovery from the settling defendants at a time before any determination as to liability. The evidence adduced at trial and during the damages phase of the case firmly established

Local 3's liability, and further demonstrated that the plaintiffs' total actual damages were far in excess of the amount which they recovered from the other defendants in the Consent Decree settlement. It is obvious that plaintiffs have not been fully recompensed, and the Court therefore finds this argument without merit.[2/]

The union further argues that it should not be responsible for any backpay awards because Local 3 had no duty to represent the plaintiffs. This contention may be rejected summarily. Even though Local 3 did not have a duty as the exclusive representative of the plaintiffs, it is quite clear that, having assumed the role of the employment referral agency for the Garden, it had a duty to refer individuals for the position of laborer in a fair manner which did not discriminate on the basis of race

or national origin. It is this duty which the union breached and which caused substantial harm to the plaintiffs.

Local 3 argues that "[i]f a backpay assessment were paid by the Garden's sixty laborers...they would patently be bankrupt. If an assessment were levied against the Union membership at large, responsibility would thereby be imposed upon people who had no knowlege of the discriminatory acts, including Blacks and Hispanics...." Defendant's Objections at 37. If the defendant is contending that the amount of damages assessable against the union should be limited by the amount that the sixty individual laborers could themselves afford to pay, it cites no authority for that suggestion. If the defendant is arguing that only a local may be held liable for union offenses with purely local effects, it likewise cites no legal

authority for that proposition. The Court rejects both of these arguments. Plaintiffs' rights to damages sustained by virtue of defendant's discrimination is not limited to any amount by which the defendant or its members may be said to have benefitted. It is not because it has unjustly enriched, but because of the extent of the damage it has inflicted, that the award has been recommended. Defendant's objection that members of other locals of the union will suffer because of the misdeeds of a single local is an objection which relates to the internal management and leadership of the defendant, but plaintiffs' right of recovery should not be diminished because of such concerns.

The defendant further cites several pre-Teamsters cases for the proposition that the applicable law of this Circuit does not permit the award

of backpay to nonapplicants. Defendant's Objections at 31-33. This argument was explicitly discussed and rejected in this Court's remedy Opinion and need not be recounted here. Ingram, 482 F.Supp. 918, 925-26 & n. 15 (S.D.N.Y. 1979). In fact, since the time of that Opinion, the Court of Appeals for the Second Circuit has clearly stated that it does not view the precedent in this Circuit as a bar to an award of backpay damages to nonapplicants who have proved that they are actual victims. See Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1020 n.3 (2d Cir. 1980) cert. denied, 101 S.Ct. 3083 (1981). Local 3 completely ignores this post-Teamsters statement.

The Court, taking into account such considerations as the economic burden to the defendant and the number of class members as to whom a backpay award is now relevant, exercises its discretion in

favor of awarding backpay to nonapplicant victims in this case. Suffice it to say that the Court adheres to its previously stated view that "limiting the type of relief available to a victim of discrimination because he is a nonapplicant would be inconsistent with the duty of the courts to 'secure justice' and provide a 'make whole' remedy for such victims." Ingram, 482 F.Supp. 918, 925 (S.D.N.Y. 1979), quoting Teamsters, supra, at 364.

The defendant contends that there was no clear proof of the futility of applying for a laborer's job such as to justify an award of backpay to non-applicants. It further asserts that no class member proved a credible and convincing unexpressed desire to work as a laborer.

The Court sees no reason to change its prior post-trial finding that

the atmosphere at the Garden was such that class members could reasonably have believed in the futility of seeking referral from Local 3. See Ingram, 482 F.Supp. 918, 923 (S.D.N.Y. 1979); Ingram, 482 F.Supp. 414, 421 (S.D.N.Y. 1979). It should be noted that this finding was specifically endorsed by Magistrate Sinclair who stated that "defendants offered no proof displacing the inescapable finding which underlies Judge Sand's decisions and which I find to be sustained in all the testimony before me, that the futility of taking steps to seek a laborer's position was real, apparent and well known to the claimants." Magistrate's Findings of Fact at 3-4 (November 21, 1980).

The Court likewise rejects Local 3's second argument which is based solely on its general assertion that the claimaint's testimony was incredible.

Magistrate Sinclair's painstaking analysis of the evidence applicable to each individual claimant was exemplary. It is apparent from the Magistrate's findings and the record that he used an exacting standard before finding that a particular nonapplicant had a desire to be a laborer which remained unexpressed because of futility. The care with which the Magistrate considered all matters before him, including issues of individual credibility, is supported by the fact that he ultimately recommended a backpay award for only nineteen members of the plaintiff classes. The Court finds that there is ample evidence to support the conclusion that all but one of these class members did indeed hold a desire to become a laborer which remained unexpressed because of the futility of seeking a Local 3 referral.

The defendant argues that since

the laborer's job is more strenuous than the cleaner's job, backpay awards should not be based on a laborer's salary. In support of this argument, the union points to sex discrimination cases which have attempted to harmonize Title VII with the Equal Pay Act, 29 U.S.C. § 206(d), a statute specifically designed to guarantee equal pay for equal work regardless of sex. See Defendant's Objections at 47-52. The defendant contends that since Equal Pay Act concepts have found their way into the equal pay sex discrimination cases brought under Title VII, such concepts should be incorporated into other types of Title VII actions. The Court rejects this argument. Defendant acknowledges that the cases on which it relies have been concerned specifically with the policy that Title VII doctrine not conflict with Equal Pay Act doctrine, thereby preventing a unified body of law from

emerging in sex discrimination cases alleging unequal pay for equal work. This rationale is inapplicable to the present case, since neither the Equal Pay Act in particular, nor sex discrimination in general, is implicated. Local 3 has failed to provide the Court with any convincing reason for transplanting concepts which developed in the context of a particular type of employment discrimination and a particular sex discrimination statute to a case involving discriminatory referral practices based on race or national origin.

Local 3 states that early in 1977, the union had done all it legally could do to abate damages, and that it should therefore not be required to make any backpay award for post-1976 earnings. Even accepting arguendo defendant's representation as to its

abatement of damages, this argument is insufficient in the context of this case. The plaintiffs seek backpay awards to compensate them for the injury they suffered as a result of the defendant's discriminatory referral practices, and the defendant is liable for the effects of such practices through the time that the discrimination is actually remedied. In this case, the date of remedy would occur when the class member under consideration becomes a laborer. Local 3's abatement of damages is relevant only to the extent that there was an actual reduction in plaintiffs' compensable injuries. Local 3 has not contended that any action resulted in such a reduction.

The union asserts that all of the cleaners failed to mitigate damages by seeking a laborer's position inside or outside the Garden. Since feelings

of futility justified the victims' failure to apply for Garden laborer jobs, it is obviously absurd for the defendant to argue, as it does, that these claimants should nevertheless be required to make this futile application for mitigation purposes.

As to the duty of plaintiffs to seek laborer's jobs outside the Garden, this Court fully endorses Magistrate's Sinclair's reasoning. See Magistrate's Findings, Conclusions and Recommendations on Back Pay at 11-12 (July 27, 1981). The defendant has itself acknowledged that "[a]ll the court decisions...held that persons holding full time jobs were not required to do anything more to mitigate damages." Magistrate's Findings, Conclusions, and Recommendations on Back Pay at 11 (July 27, 1981), quoting Memorandum in Support of Defendant's Contention that the Porters Had a Duty to Mitigate Damages at 1.

And, as the Magistrate has explained:

> "The course urged by defendants would permit effective subversion of statutory purposes: employers could deny an individual a higher paying job and offer that individual the Hobson's choice of retaining his present job and forswearing back pay relief or leaving his present job for a job which, although perhaps nominally better paying, might require the sacrifice of convenience, security or seniority."

Magistrate's Findings, Conclusions and Recommendations on Back Pay at 12 (July 27, 1981). In any event, case law in this Circuit has held that "[t]o sustain its burden of establishing such deductions [from a backpay award], the defendant must show not only that the plaintiff failed to exercise due diligence in seeking employment, but also that had she been diligent, she might have found employment and had some earnings." EEOC v. Kallir, Phillips, Ross, Inc., 420 F.Supp. 919, 926 (S.D.N.Y. 1976), aff'd 559 F.2d 1203 (2d Cir.), cert. denied, 434 U.S. 920 (1977). Local 3

has failed to meet this burden.

Defendant further argues that many claimants worked less than they should have, reflecting a lack of reasonable diligence. Local 3 has wholly failed to prove this assertion, and apparently has foregone its opportunity during the development of the record to inquire into such matters as voluntary absences from work. Thus, the Court finds no merit in any of the defendant's objections relating to a failure to mitigate damages.

According to the defendant, the disciplinary records of some of the claimants would have prevented them from being hired as laborers even absent any discriminatory practices. This Court agrees with Magistrate Sinclair's conclusion that such records are irrelevant since, during the time period in question, the Garden never reviewed the prior work records of any laborer referrals. See

Hearings Before the Magistrate at 869 (April 16, 1980) (Testimony of Mr. Donopria). Such records would therefore not have been the basis for a decision not to hire particular claimants, all of whom were continued in their employment at the Garden subsequent to the alleged infractions.

In addition to its many other exceptions, the defendant objects to the recommended award for each and every plaintiff for whom the Magistrate proposed relief. For the most part, the defendant attempts to show that the Magistrate's findings as to the credibility of these plaintiffs should be reversed.

The Court will not engage in a protracted recounting of the case in favor of an award for each of those plaintiffs for whom the Magistrate made a favorable recommendation. Instead, the

Court notes its support for the careful and conscientious manner in which the Magistrate made individual findings based on the record before him, the memoranda submitted by the parties, and most importantly, his judicious evaluations of credibility. As the plaintiffs have correctly noted, the Magistrate generally resolved instances of ambiguity or doubt against the claimant and, with the one exception noted below, he only recommended awards when the record fully supported such recommendations. See Plaintiffs' Reply at 25-26 and citations therein. It should particularly be observed that the Magistrate was in no way reluctant to discredit the evidence presented by a claimant when the circumstances so warranted. See Magistrate's Findings of Fact, at ¶¶ 5, 18, 21, 24, 79, 81, 95, 107, 137, 139 (November 21, 1980). The Court therefore expresses its approval of the

Magistrate's individual award recommendations and enters into a discussion only of the findings with respect to the claimant Herbert Bruton. The Magistrate reviewed Bruton's claim solely on the basis of his pretrial deposition. See Magistrate's Findings of Fact at ¶ 152 (November 21, 1980). The Magistrate's finding was not, therefore, based upon a finding of credibility affected by the demeanor of a live witness. The Magistrate found that Bruton is an actual victim because he "showed that he would have applied for a referral to the Garden for work as a laborer had it not been for Local 3's discriminatory practices by testifying that he wanted the job but didn't apply because Shelly Anderson and J. Perry had tried to get the job and had been unsuccessful." Magistrate's Findings of Fact at ¶ 154 (November 21, 1980). The Magistrate further found that "Bruton's desire date

is 1946 because he testified that he wanted the laborer job when he started at the Garden." Id. at ¶ 155. On the basis of these conclusions, Bruton was assigned a seniority date of October 24, 1965.

The Court cannot agree with this assessment of the record, and determines that Herbert Bruton is not an actual victim of the defendant's discriminatory policies. Despite Bruton's single statement that he wanted the laborer job when he started at the Garden, he never applied for a laborer's job or told anybody that he was interested in it, allegedly because of his conversation with Anderson. After questioning as to Bruton's interest in various positions at the Garden, Bruton virtually admitted that he was not a victim:

> "Q: The fact is that for many years before you spoke with Anderson and in fact from the time you started working at the Garden, you really had no interest in becoming a laborer, isn't that true?

A. No, I didn't."

Deposition of Herbert Bruton at 20-21 (January 17,1979).

The Court agrees with the Magistrate's finding that "[a] 'couple of years' before he retired (i.e., as of 1973), Bruton was no longer interested in getting the job because he was on his way out." Magistrate's Findings of Fact at ¶ 153 (November 21, 1980), citing Deposition of Herbert Bruton at 15-16 (January 17, 1979). But this alleged loss of interest occurred at virtually the same time that Bruton had the conversation with Anderson which provided the basis for the Magistrate's finding that Bruton was a victim. Thus, even assuming arguendo that Bruton did at some point desire employment as a laborer, he renounced such interest at the very time that he would have become justified in failing to apply for the position because of futility.

The Court therefore is not persuaded that Bruton would have applied for a referral for work as a laborer had it not been for Local 3's discriminatory practices, and is further not satisfied that Bruton ever harbored a desire for that work. The Court finds that Bruton is not a victim and that he is therefore not entitled to any award.

We turn now to a discussion of some of the plaintiffs' objections to Magistrate Sinclair's reports and recommendations.

This Court has previously ordered Local 3 to submit a plan for the establishment of referral lists and copies of proposed notices to be posted in the Garden, as well as to set forth procedures for the referral of class members by Local 3. See Ingram 482 F.Supp. 918, 927-28 (S.D.N.Y. 1979). It is undisputed that, since that time, Local 3 has ceased to play any role in the hiring of laborers at the Garden.

Consequently, the Court agrees with the Magistrate's conclusion that these elements of prospective relief should be deemed mooted. See Magistrate's Interim Order on Monetary Relief at 18 (December 8, 1980). The plaintiffs' request that an Order issue limiting any future role of Local 3 in laborer hiring and referral is therefore rejected.[3/]

Plaintiffs except to the Magistrate's determination that claimants Mahadeo, an Indian, and Ibrahim, an Egyptian, are not class members. The Court completely endorses the Magistrate's conclusion and reasoning on this issue as they are persuasively and comprehensively set forth in Magistrate's Findings of Fact at 4-10 (November 21, 1980).

On July 27, 1981, Magistrate Sinclair withdrew his earlier findings that Group V claimants -- those who

applied for or desired a laborer's position during 1978-1980 -- were victims of the defendant's discriminatory practices. See Magistrate's Findings, Conclusions and Recommendations on Back Pay at 4-9 (July 27, 1981). The Magistrate reasoned that the actual referral of laborers that was done during this period was not necessarily the result of the discriminatory policy found at trial.

The plaintiffs object to this reasoning with respect to two of the claimants, Luis Jaiman and Eloise Moore, and the Court finds these objections to be valid ones. These two claimants were assigned recommended seniority dates of October 11, 1978, based on the hire date of Group IV laborer Benigno Rivera. See Magistrate's Findings of Fact at ¶¶ 73, 93 (November 21, 1980). The evidence presented at the trial, on August 27-30, contained up-to-date information as to

statistics and referral policy, and Rivera's hire was included in the data upon which the finding of liability was largely premised. See Ingram, 482 F.Supp. 414, 424 and n. 24 (S.D.N.Y. 1979). The Court found that the defendant's discriminatory policy was in effect and continuously adhered to up through the time of the trial -- a date subsequent to the time of Rivera's hire and Jaiman's and Moore's desire dates. See id. at 423.

The fact that Rivera is Hispanic means neither that Jaiman and Moore were not really victims, nor that the union had ended its discriminatory policies. Rather, as this Court found at trial, the defendant, as part of its discriminatory policy, occasionally hired blacks or Hispanics, albeit in numbers significantly below their percentage in the labor market surrounding the Garden. The Magistrate has stated that, in any event, the 1978 referral

"would have been the rightful place of one of the four victims who sought or desired the laborer's position in late 1976, and not the rightful place of a claimant who desired a laborer's job in 1978." Magistrate's Findings, Conclusions and Recommendations on Back Pay at 7 n. 2 (July 27, 1981). See also Magistrate's Interim Order on Monetary Relief, at 13 n. 12 (December 8, 1980). However, if Jaiman and Moore are added to the list of Group IV victims, the total of such claimants is raised to six, a number exactly equal to the number of Group IV comparison laborer referrals made during the period 1976-1978. The Court is not persuaded that Jaiman and Moore could not, as a matter or rightful place relief, have filled the position for which Rivera was referred.

The plaintiffs concede that the recovery for these two claimants may

appropriately be set at zero, for they state: "In view of the fact that no Group IV claimant's recommended awarded [sic] included any backpay, no new computation need be done if Moore and Jaiman are included in the victim group." Plaintiffs' Objections Pursuant to 28 U.S.C. § 636(b) and Southern District of New York Rules for Proceedings Before the Magistrates, Rule 7 at 15 (hereinafter "Plaintiffs Objections").

For the reasons stated above, the Court finds that Jaiman and Moore were actual victims of defendant's discriminatory policies, that their seniority date is October 11, 1978, and that they are entitled to no backpay.

Plaintiffs also object to the Magistrate's recommendation regarding the computation of claimants' lost annuity benefits. Plaintiffs seek annuity payments for certain claimants

in amounts equal to the average annuity entitlement of the corresponding laborers' control group -- a proposal which would make the union liable for amounts the Garden should have paid prior to the statute of limitations dates and seniority dates. They argue that annuity entitlement should be calculated according to when cash sums under the plan are payable to annuitants, rather than when the contributions are made to the fund. Plaintiffs' Objections at 20-24.

The Magistrate has discussed this issue thoroughly and persuasively, see Magistrate's Findings, Conclusions and Recommendations on Back Pay at 19-22 (July 27, 1981), and the Court completely adopts the reasoning which led him to conclude that "[t]he weight of logic and authority clearly favors defendant's position." Id. at 21.

The measuring period for plaintiffs' recpvery in this case runs until the date when a particular victim is hired as a laborer. Many of the claimants who have been adjudicated victims of discrimination in this action have not yet attained their rightful place as laborers at the Garden. Since these plaintiffs' future lost earnings are speculative and their lost pension benefits are ascertainable only at retirement, the Court will assume continuing jurisdiction over this case in order to evaluate these damages. Such "front pay," as recommended by Magistrate Sinclair, will be computed according to the same method that has been applied in calculating backpay. See Magistrate's Interim Order on Monetary Relief at 17 (December 8, 1980).

The Magistrate recommended a total backpay award of $749,317. Subtracting Herbert Bruton's suggested

recovery from this amount, this Court finds that the victim claimants were monetarily damaged to the extent of $729,912. These class members have already been compensated $117,500 by virtue of the Consent Decree entered into between the plaintiffs and the defendants other than the union, and Local 3 will not be held accountable for that sum. The union has not argued that it is unable to pay the remaining amount of monetary damages, nor has it presented any persuasive reasons for which it should not be liable for that total.[4/] The Court finds, therefore, that Local 3 is liable to the plaintiffs for a back-pay award of $610,412.

COUNSEL FEES

By order dated November 10, 1981, Magistrate Sinclair recommended that counsel for plaintiffs be awarded $233,445.06, of which $175,665.21 consists

of fees based on a lodestar figure (reasonable hours expended multiplied by the reasonable hourly rate);[5/] $14,690.80 reimbursement for expenses; $27,973.04 as a multiplier augmentation, and $15,116.01 representing interest at 6%.

In calculating this award, the Magistrate recommended that the fee be based on one-third of the time spent prior to August 11, 1979 (when settlement was reached with the co-defendants) and all of the attorneys' time spent between August 11, 1979 and December 13, 1979, augmented by a multiplier of 25%. On this latter date, liability of the defendant was fixed and therefore, the Magistrate reasoned, the time expended was not subject to the risks and contingencies for which a multiplier compensates. Plaintiffs' counsel makes no objection to the fee award.

We believe that the Magistrate's recommendation reflects a sound and thorough consideration of the issues presented and we have little to add to his perceptive analysis. For the reasons he has stated, neither the not-for-profit character of the defendant, nor an ability to pay factor, warrants an adjustment of the fee award on the basis of the record here. See Magistrate's Fee Report at 21 (October 23, 1981).

We find fully justified the Magistrate's observation that "instead of raising these issues at the hearing, defendant spent its time in a vexatious, time-wasting attack on plaintiffs' counsel and in an unfruitful, nitpicking excursion through innocuous details and markings in plaintiffs' counsel's time logs and records." Magistrate's Fee Report at 21-22 (October 23, 1981).

Defendant's objections to the fee recommended by the Magistrate are equally meritless.

Except as modified herein, the Magistrate's reports are adopted.

SO ORDERED.

Dated: New York, New York
March 23, 1982

_____
U.S.D.J.

FOOTNOTES

1/ The many Opinions filed in this case will be cited simply as "Ingram," followed by reference to reporter volume and page number. Where appropriate, Opinions will be referred to simply by date of filing.

2/ It is a frequent occurrence, especially in class action litigation, that settling defendants pay less in damages than those who pursue to the bitter end cases such as this one, in which liability is clearly established. The very concept of compromise and settlement embodies the notion of a reduction from the amount plaintiffs otherwise hope to recover. The relationship between the award recommended by the Magistrate and the amount of the settlement in this case is not surprising.

3/ This Court will, in any event, be retaining jurisdiction over this proceeding (e.g., with respect to front pay damages). Our ruling is without prejudice to a renewed application to this Court in the event that Local 3 should resume exercising a role in the hiring of Garden laborers.

4/ See, p. 13, supra. This question was specifically reserved by the Court in its remedy Opinion. See Ingram, 482 F.Supp. 918, 927 (S.D.N.Y. 1979).

5/ This is computed at $100 per hour for Mr. Tesser and $60 per hour for his assistant, Ms. Altman, except that time spent in preparing exhibits is to be compensated at the rate of $50 per hour. See Magistrate's Report Containing Findings and Recommendations Re Plaintiffs' Fee Application at 10, 18 (October 23, 1981) (hereinafter "Fee Report").

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HENRY INGRAM, JAMES BRITT, WILLIAM MOODY and ROY T. FLOYD, individually and on behalf of all persons similarly situated,

Plaintiffs,

-against-

MADISON SQUARE GARDEN CENTER, INC., MADISON SQUARE GARDEN CORPORATION, ALLIED MAINTENANCE CORPORATION, ALLIED PUBLIC EVENTS SERVICE CORPORATION, and LOCAL #3, I.B.E.W.,

Defendants.

76 Civ. 5870 (RJW)

Plaintiffs Henry Ingram, James Britt, William Moody and Roy T. Floyd move for class action certification pursuant to Rule 23, Fed. R. Civ. P. For the reasons set forth below, the motion is granted and, subject to the condition stated in Part I(A)(3) infra, the following classes are certified:

(1) a Title VII class consisting of:

all black persons who, since November 21, 1972, have been employed, or who will in the future be employed, as cleaners, bathroom or bowling alley attendants, or elevator operators for Madison Square Garden Center, Inc., Allied Maintenance Corporation or Allied Public Events Service Corporation at Madison Square Garden, or who receive pensions based on their employment as cleaners, bathroom or bowling alley attendants or elevator operators for Madison Square Garden Center, Inc., Allied Maintenance Corporation or Allied Public Events Service Corporation at Madison Square Garden or who have unsuccessfully applied for positions or will in the future apply for positions as laborer-utilitymen at Madison Square Garden.

(2) A §§ 1981 and 1985 class consisting of:

all black and Hispanic persons who, since December 30, 1973, have been employed, or will in the future be employed as cleaners, bathroom or bowling alley attendants, or elevator operators for Madison Square Garden Center, Inc., Allied Maintenance Corporation or Allied Public Events Service Corporation at

> Madison Square Garden, or who receive pensions based on their employment as cleaners, bathroom or bowling alley attendants or elevator operators for Madison Square Garden Center, Inc., Allied Maintenance Corporation or Allied Public Events Service Corporation at Madison Square Garden or who have unsuccessfully applied for positions or will in the future apply for positions as laborer-utilitymen at Madison Square Garden.

The named plaintiffs in this action are persons presently or formerly[1/] employed as cleaners at Madison Square Garden ("the Garden"). They allege that defendants Madison Square Garden Center, Inc. ("Center"), Madison Square Garden Corporation ("the Garden Corporation"), Allied Maintenance Corporation ("Allied Maintenance"), Allied Public Events Service Corporation ("Allied Public Events"), and Local #3, I.B.E.W. ("Local 3") have engaged and continue to engage in a pattern or practice of discrimination against them in hiring, work assign-

ments, wages and other benefits because of their race or national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 et seq., and the Civil Rights Acts of 1861 and 1866, 42 U.S.C. §§ 1981 and 1985(2)(3). They seek injunctive and declaratory relief and damages.

Plaintiffs originally sought certification of a class consisting of "all non-white laborers and employees of comparable designation who work, have worked, or have sought to work directly or indirectly for Madison Square Garden Center, Inc." Local 3 objected to the maintenance of this suit as a class action, claiming that none of the requirements of Rule 23 were satisfied.[2/] Center and Allied Maintenance did not object to the certification of an appropriate class, but believed that plaintiffs' proposed class

definition was too broad because all named plaintiffs were employed as "porters," a type of cleaner, and thus plaintiffs could not adequately represent the interests of bathroom and bowling alley attendants, elevator operators or any other groups. They also argued that plaintiffs' definition was deficient because it recognized no statute of limitations.

The Court concurred in defendants' belief that the proposed definition was inadequate, and scheduled a conference for May 18, 1978. After hearing argument, the Court granted plaintiffs' oral motion to amend the complaint so as (1) to limit the groups of current, past and future employees included in the proposed class to cleaners, bathroom and bowling alley attendants and elevator operators who work at Madison Square Garden for Madison Square Garden Center, Inc., Allied Maintenance Corporation or Allied Public Events

Service Corporation; and (2) to allege discrimination on the basis of national origin, as well as race, and (3) to include Hispanics in the class for purposes of the non-Title VII claims. Plaintiffs' attorney also indicated his intention to move to add further named plaintiffs to the action who were or had been employed as bathroom and bowling alley attendants and elevator operators.

On June 2, 1978, plaintiffs filed a fourth amended complaint charging discrimination on the basis of national origin as well as race, and seeking to represent a class consisting of

> "past, present and future black and Hispanic cleaners, bathroom and bowling alley attendants and elevator operators at Madison Square Garden employed by Madison Square Garden Center, Inc., Madison Square Garden Corporation, Allied Maintenance Corporation and/or Allied Public Events Service Corporation and blacks and Hispanics who have sought or will seek to work at Madison Square Garden as laborer-utility personnel."

The Court must now consider whether the newly proposed class is appropriate for certification in light of defendants' objections that the requirements of Rule 23 are not satisfied and that the proposed class definition does not recognize any statute of limitations.

I. Rule 23

Rule 23, Fed.R.Civ.P., sets forth the requirements for class action certification. It provides in pertinent part:

> (a) Prerequisites to a Class Action.
> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable.
> An action may be maintained as a class action if the prerequisites

> of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole....

The Court will address the requirements of Rule 23 as applied to the present case seriatim:

A. Rule 23(a)

1. Numerosity

Plaintiffs estimate that the proposed class consists of more than 100 persons. On the basis of the documents available to them thus far, plaintiffs indicate that, since 1969, 141 of 228 Allied bathroom attendants and cleaners have been black, and an additional 46 have been Hispanic. Even assuming that half of these persons are not properly included in the class due to the statute of

limitations,[3] 93 legitimate class members would still remain. Moreover, these statistics do not account at all for class members who have previously been or are now employed as bowling alley attendants or elevator operators,[4] nor do they include any prior unsuccessful applicants or employees. On the basis of the presently available statistics, and in light of the as yet unaccounted for additions, the Court is satisfied that the class is sufficiently large that joinder of all members is impracticable.

2. Commonality

The basic question common to the claims of all class members is whether defendants have engaged in a continuing policy of discrimination against plaintiffs in hiring, work assignments and wages and other benefits because of their race or national origin. Such questions are sufficient to meet the commonality

requirement of Rule 23. See, e.g., Leisner v. New York Telephone Co., 358 F.Supp. 359, 371 (S.D.N.Y. 1973); Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 521 (S.D.N.Y. 1973), appeal dismissed, 496 F.2d 1094 (2d Cir. 1974); Hecht v. Cooperative For American Relief Everywhere, Inc., 351 F.Supp. 305, 312 (S.D.N.Y. 1972).

Local 3 argues that "the questions of fact are diverse. Some non-white persons may have sought employment as laborers, but many cleaners have not, and given an election when they started work might well have preferred jobs as cleaners, all of which are full time, to jobs as laborers, many of which are part time." Even assuming that these factual differences exist, they are not controlling. Rule 23 requires only that there be common questions of law or fact. The questions need not be identical. Leisner v. New York Telephone Co., supra, 358 F.Supp. at 372.

Nor is it fatal if some class members might prefer not to have their rights vindicated. Id., see Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 937 (2d Cir. 1968).

3. Typicality

Although it has been suggested that this requirement has no independent meaning and is merely duplicative of the Rule 23(a)(2)&(4) requirements, see 3B Moore's Federal Practice ¶23.06-2 at 23-325; 7 C. Wright & A. Miller, Federal Practice and Procedure §1764 at 611-12 ("Wright & Miller"), "[a]ny inquiry into typicality under Rule 23(a)(3) requires a comparison of the claims or defenses of the representative with the claims or defenses of the class." Taylor v. Safeway Stores, Inc., 524 F.2d 263, 270 (10th Cir. 1975). Thus, this prerequisite may be used "to screen out class actions when the legal or factual position of the representatives is markedly different

from that of other members, even though common issues of law or fact are raised." 7 Wright & Miller, supra, §1764 (Supp.1978), citing, e.g., Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975); Aiello v. City of Wilmington, 426 F.Supp. 1272 (D.Del. 1976).

In the present case, defendants Center and Allied Maintenance contend that named plaintiffs' claims are not typical because the skill, effort, responsibility and racial composition of named plaintiffs' positions as porters is radically different from that of other cleaners, bathroom and bowling alley attendants and elevator operators. The Court, however, believes, on the evidence before it, that there is no significant distinction in the nature of the job categories included in the class. All of these categories consist of disproportionately minority, non-skilled manual laborers who allege to have been denied access to the more desirable position of laborer-utilityman and to have been

shunted to a different union and to lower paying, more demeaning jobs because of their race or national origin. The similarity in skill, effort, responsibility and racial composition of these positions is attested to by uncontroverted affidavits submitted by plaintiffs which state that the persons employed in the proposed categories are predominantly black and Hispanic and that they are required to act as substitutes in other of the named categories as the need arises.[5/]

Moreover, plaintiffs' counsel has indicated that he intends to seek leave for persons other than cleaners to intervene as plaintiffs in this action. The Court believes that intervention by such additional plaintiffs would be desirable to ensure that their interests are fully represented. Accordingly, though, the Court is provisionally satisfied that the claims of the named

plaintiffs meet the typicality requirement, certification of the class will be conditioned on persons employed as bathroom and bowling alley attendants and elevator operators moving to intervene in this action on or before June 30, 1978. Should it subsequently appear that unanticipated differences in interests exist within the class,[6/] the Court will then be in a position to deal with the problem through the designation of appropriate subclasses.

4. Adequacy of Representation

In finding that the named plaintiffs' claims are typical of those of the proposed class, the Court has implicitly concluded that the interests of the named plaintiffs are essentially coextensive with those of the entire class. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-63 (2d Cir. 1968).

In addition, the interests of the class representatives must not be antagonistic to those of the rest of the class. Id. at 562, citing Hansberry v. Lee, 311 U.S. 32 (1940). Defendants contend that because the named plaintiffs have been working at the Garden for many years, they may have a conflict of interest insofar as seniority may play a part in any relief ordered. However, any such conflict of interest would not arise in connection with the questions of liability and injunctive relief posed by this action, but only with regard to individual relief. Should any antagonistic interests appear in the relief phase of the proceedings, the Court can deal with them at that time. See Leisner, supra, 358 F.Supp. at 372.

Another important consideration in deciding the adequacy of representation is whether the representatives' attorney

is "qualified, experienced and generally able to conduct the proposed litigation." Eisen, supra, 391 F.2d at 562. The Court has questioned plaintiffs' attorney with regard to his background and experience and is satisfied that he possesses the qualifications, experience and resources necessary to conduct this litigation effectively. Furthermore, there is no evidence to suggest that the litigants are involved in a collusive suit. Id.

B. Rule 23(b)(2)

Plaintiffs allege that defendants maintain a policy of discrimination against non-whites in hiring, work assignments, wages and other benefits and seek to enjoin defendants from engaging in such practice and policy in the future. Thus, it is obvious that the requirement of Rule 23(b)(2) that "the party opposing the class has acted or refused to act on grounds generally applicable to the class,

thereby making appropriate final injunctive relief or corresponding declaratory relief with regard to the class as a whole" has been met.

Accordingly, the Court finds that this case may proceed as a Rule 23(b)(2) class action, provided that additional plaintiffs representing bathroom and bowling alley attendants and elevator operators move to intervene in this action by June 30, 1978.

II. Statute of Limitations

Defendants Center and Allied Maintenance further object to plaintiffs' proposed class definition because it recognizes no statute of limitations. 42 U.S.C. § 20003-5(e) defines the statute of limitations for actions filed under Title VII. It states that unless proceedings have been instituted before state or local agencies, a charge must be filed with the EEOC within 180 days of the

occurrence of the alleged unlawful employment practice. As to plaintiffs' claims under §§ 1981 and 1985, the statute of limitations is determined by reference to state law. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975). This circuit has held that the appropriate New York provision is CPLR §214(2), which imposes a three-year limitations period on "action[s] to recover upon a liability created or imposed by statute...." See, e.g., Cates v. Trans World Airlines, Inc., 561 F.2d 1064, 1067 n.4 (2d Cir. 1977); Weise v. Syracuse University, 522 F.2d 397, 408 n.15 (2d Cir. 1975); DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 312 n.8 (2d Cir. 1975).

Based on these limitations periods, defendants contend that membership in the class seeking relief pursuant to Title VII must be restricted to those who have been employed or have been denied

employment at the Garden since November 21, 1972, and that membership in the §1981 class should be limited to persons employed or denied employment since December 30, 1973.[7/] The parameters urged by defendants result in the exclusion from the plaintiff class of the following three groups of persons included in plaintiffs' proposed defintiion: persons who unsuccessfully sought work as laborer-utilitymen prior to the stated dates ("applicants"); former cleaners, bathroom and bowling alley attendants and elevator operators who ceased such employment prior to the stated dates and who receive no pension based on such employment ("former employees"); and retirees, whose active employment as cleaners, bathroom and bowling alley attendants or elevator operators terminated prior to the stated dates, but who receive a pension based on such employment ("pensioners").

Plaintiffs contend that the claims of these persons are excepted from the normal statute of limitations because defendants have engaged in a continuing policy of discrimination. They rely on the continuing violation theory, which permits "[a] continuously maintained illegal employment policy [to] be the subject of a valid complaint until a specified number of days after the last occurrence of an instance of the policy." Acha v. Beame, 570 F.2d 57, 65 (2d Cir. 1978)(emphasis in original),citing Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 246 (3d Cir.), cert. denied, 421 U.S. 1011 (1975); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 986-90 (D.C. Cir. 1973); 118 Cong. Rec. 7565 (March 6, 1972).[8/] Moreover, previous targets of the discriminatory policy, who continue to be adversely affected thereby, may sue and, if successful,

recover for injuries sustained even before the beginning of the limitations period. See, e.g., id.; Egelston v. State University College at Geneseo, 535 F.2d 752, 755 (2d Cir. 1976); Briggs v. Brown & Williamson Tobacco Corp., 414 F.Supp. 371, 378 (.E.D. Va. 1976). The purposes of the statute of limitations is not thwarted by permitting recovery for such claims. Because the defendant is alleged to have recently engaged in the discriminatory policy, the claim is fresh. E.g., Egelston, supra, 535 F.2d at 755; Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 518 (S.D.N.Y. 1973), appeal dismissed, 496 F.2d 1094 (2d Cir. 1974).

In the instant case, plaintiffs allege that defendants have engaged in a policy of discrimination in hiring, work assignments, wages and other benefits which continues to date. Applicants,

former employees and pensioners were all once targets of this alleged policy. Therefore, these groups may be included in the class if they continue to be adversely affected by the policy.

Applicants

Applicants, who prior to the limitations period were denied employment due to a still on-going discriminatory hiring policy, have been permitted to assert their claims under the continuing violation theory. See, e.g., Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 987-88 (D.C. Cir. 1973); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011, 1013-16 & n.9 (5th Cir. 1971); Stroud v. Delta Airlines, Inc., 392 F.Supp. 1184, 1189 (N.D. Ga. 1975), aff'd, 554 F.2d 892 (5th Cir. 1977); Cisson v. Lockheed-Georgia Co., 392 F.Supp. 1176, 1181 (N.D. Ga. 1975); Kohn v. Royall, Koegel & Wells, supra, 59 F.R.D. at 518. Because the

policy is ongoing, reapplication within the limitations period would be a needless, futile gesture. See Macklin, supra; Cisson, supra; cf. International Brotherhood of Teamsters v. United States 431 U.S. 324, 365-67 (1977).

In the present case, plaintiffs argue that defendants' discriminatory hiring policy still injures prior applicants by barring them from the position of laborer-utilityman. This argument is not valid as to all applicants. For example, applicants who are no longer interested in employment as laborer-utilitymen because they have found equivalent or superior positions cannot fairly be said to be so injured. However, it is nonetheless true that others who have been unable to secure comparable employment are still affected by the alleged practice. See Briggs v. Brown & Williamson Tobacco Corp., supra, 414 F.Supp. at 378. At this

juncture, it is not possible to ascertain which of the applicants suffer continued injury and which do not. Therefore, the Court will make no such distinction for purposes of class definition for the liability portion of the case. All applicants will be included in the class.

Former Employees

Former employees, by contrast to applicants, have generally been denied the benefits of the continuing violation theory because they are no longer affected by the alleged discriminatory practice or policy. See, e.g., Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1234 (8th Cir. 1975) (en banc); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 246 (3d Cir.), cert. denied, 421 U.S. 972 (1975); Burwell v. Eastern Airlines, Inc., 68 F.R.D. 495, 499 (E.D. Va. 1975); cf. Smith v. American President Lines, Ltd., 571 F.2d 102, 108 (2d Cir. 1978). See also Developments in

the Law-Employment Discrimination & Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1210-11 (1971). This same result obtains in the present case. Former employees are not currently injured by defendants' alleged discriminatory work assignments, wages and other benefits [9] because they are no longer receiving any work assignments, wages or benefits from defendants.[10] Consequently, their claims must be excluded from the class on the basis of the statute of limitations. Of course, if any former employee was discriminatorily denied a position as a laborer-utilityman, he or she may assert such claim as an applicant.

Pensioners

Pensioners may assert claims of continuing violation when the employer's discriminatory practice continues to affect them in the size of their pensions. See, e.g., Dennisen v. City of Los Angeles,

10 EPD ¶10,356 at 5478 (C.D. Cal. 1975); Mixson v. Southern Bell T.&T. Co., 334 F.Supp. 525 (N.D. Ga. 1971); cf. American Finance System Inc. v. Harlow, 65 F.R.D. 94, 102-04 (D.Md. 1974). See also City of Los Angeles v. Manhart, 46 U.S.L.W. 4347 (U.S. April 25, 1978) (retirees included in class challenging pension system). In the present case, the payments received by the pensioners are based on past earnings. These earnings, plaintiffs contend, were discriminatorily low due to defendants' practices in hiring, job assignment and wages. As a result, pensioners currently receive smaller pension payments than they would absent discrimination, thereby suffering continuing effect from defendants' alleged policy. Consequently, pensioners qualify for inclusion in the class.

The Supreme Court's opinion in United Air Lines v. Evans, 431 U.S. 553 (1977), contains nothing inconsistent

with this result. Plaintiff in Evans was forced to resign from her position as a United flight attendant in February 1968 because of the airline's "no-marriage" policy. United abandoned that policy several months later and, in February, 1972, plaintiff was rehired as a flight attendant. Shortly thereafter, she filed charges with the EEOC that United's refusal to credit her prior service for seniority purposes violated Title VII. Plaintiff did not allege that the seniority system itself was sex discriminatory. Rather, she contended that it gave present effect to the past unlawful "no-marriage" policy.

The Court held that plaintiff's claim was barred by the statute of limitations despite her allegation of a continuing violation:

> [Plaintiff] emphasizes the fact that she had alleged a continuing violation. United's seniority system does indeed have a continuing impact on

> her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists.

431 U.S. at 558 (emphasis in original).

Defendants analogize the neutral seniority system in Evans, which, though it perpetuated the effects of past discrimination, could not bring the case within the continuing violation theory, to the netural pension system in the present case. Assuming arguendo that this is a valid analogy,[11/] it is nevertheless an irrelevant one. The continuing violation theory did not apply in Evans because no present violation existed. Plaintiff did not contend that the seniority system itself was sex discriminatory, and the prior illegal "no-marriage" policy which gave rise to plaintiff's injury had been abandoned in 1968. Therefore, there was no "fresh" violation to justify an exception to the statute of limitations. Cf.

Smith v. American President Lines, Inc., supra, 571 F.2d at 108. In the present case, the pensioners do not base their claims merely on the effects of a "neutral" pension system. Rather, as do all other class members, they allege that defendants have engaged in and continue to this very day to engage in a policy of discrimination in hiring, work assignments, wages and other benefits. Thus, unlike Evans,[12] a present "fresh" violation exists.[13]

The Court is aware of the opinion in Freude v. Bell Telephone Co., 438 F. Supp. 1059 (E.D. Pa. 1977), holding that the continuing violation theory was not available to a pensioner who, thirteen months after retirement, filed a charge that her pension checks were discriminatorily small because her salary had been sexually discriminatory. However, nothing in the Freude opinion suggests that Ms. Freude had complained of a continuing

policy of sexually discriminatory salaries as opposed to an act of discrimination aimed at her individually. Furthermore, the decision in Frueude was based entirely on an interpretation of the Supreme Court's decision in United Air Lines v. Evans, supra, which differs from this Court's interpretation of Evans. Thus, even if Ms. Freude had alleged a continuing policy of sexually discriminatory salaries, this Court would respectfully disagree with the result reached in Freude for the reasons set forth in the foregoing discussion of Evans.

Accordingly, the Title VII and §§ 1981 and 1985 classes set forth above are certified, on condition that persons employed as bathroom and bowling alley attendants and elevator operators move to intervene as plaintiffs in this action

on or before June 30, 1978.

It is so ordered.

Dated: New York, New York
June 8, 1978

U.S.D.J.

FOOTNOTES

1 Henry Ingram, James Britt and William Moody are presently employed as cleaners. Roy T. Floyd was employed as a cleaner from 1969 to 1975.

2 The Court has considered the objections of Local 3 to plaintiffs' motion despite the fact that such objections are technically deficient in that they were made by letter, rather than by affidavit and supporting memorandum as required by the General Rules of this Court.

3 Because of the statute of limitations, cleaners and bathroom attendants who terminated their employment prior to November 21, 1972 and who do not receive pensions based thereon are not properly included in the class for purposes of the Title VII claim; similarly, such employees who terminated their employment prior to December 30, 1973 may not be included in the class for purposes of the §§ 1981 and 1985 claims. See Part II infra.

4 Plaintiffs have not yet succeeded in obtaining the relevant statistics regarding bowling alley attendants and elevator operators.

However, according to the affidavit of elevator operator Wilfred Boudreaux, four of the six elevator operators employed at the Garden on October 20, 1977 were black or Hispanic.

5 Defendants also assert that plaintiffs may not allege discrimination against any employees other than porters because such discrimination was not raised in the charges before the Equal Employment Opportunity Commission ("EEOC"). However, it is not plaintiffs' charges that determine the permissible scope of the complaint, but whether the allegations fall within "the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Smith v. American President Lines, Ltd., 571 F.2d 102, 107 n.10 (2d Cir. 1978); accord, Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970). The EEOC determination in the instant case included such findings as that "Blacks are excluded and/or under utilized in the categories of officials and managers, professionals, technicians and skilled craftsman and further shows that they are congregated in the service worker category" and that "the Respondents have restricted and limited the employment opportunities of Charging Parties and Blacks as a class." (emphasis added). Thus, it is clear that the EEOC investigation was not limited in scope to discrimination against porters. However, it does appear that the EEOC investigation was limited in scope to discrimination against blacks. Therefore, Hispanics must be excluded from the class insofar as relief is sought under Title VII.

6 Although the Court foresees no such conflict at this time, defendants believe that adverse interests could result from such factors as that the named plaintiffs are employed by

Allied Maintenance and/or Allied Public Events, while others included in the class are employed directly by Center and that the named plaintiffs are paid on a regular salary basis while other class members are paid on a per event basis.

7 Defendants do not indicate who they believe may assert claims under §1985. Presumably, they would urge the application of the same restrictions as they do to the §1981 claim.

8 See also Smith v. American President Lines, Ltd., supra ("There is authority in this circuit for the proposition that a plaintiff may defeat a time bar to a Title VII civil suit by asserting subsequent identifiable acts of discrimination related to a time barred incident," but the continuing violation theory was not available to a plaintiff charging a continuing discriminatory course of conduct against him when the last possible act of discrimination occurred outside the limitations period.)

9 If plaintiffs had alleged that the former employees had lost their jobs due to a discriminatory firing practice, it would be arguable that they continued to be affected by defendants' alleged discrimination, for it would seem that a reapplication would be no less futile in such circumstances than in the case of applicants. However, the Court need not consider this question, as plaintiffs have made no allegation of discriminatory discharge.

10 On the basis of the allegation that they did not earn as much as their white counterparts while employed, former employees may suffer some residual effect of defendants' alleged discriminatory policy. However, the Court believes that any such present effect is too attenuated to bring the claims of these former employees within the continuing violation theory.

11 But see Teamsters, supra 431 U.S. at 348-49; Griggs v. Duke Power Co., 401 U.S. 424 (1971).

12 And compare Cates v. Trans World Airlines, Inc., 561 F.2d 1064 (2d Cir. 1977) (claim that defendants' seniority system violated Title VII by perpetuating effects of prior illegal hiring system dismissed as untimely on basis of Evans: seniority system itself was neutral and non-discriminatory, and prior illegal hiring system had been discontinued no later than January 1970, more than two years before EEOC charges filed in March 1972).

13 Given a still-ongoing policy of discrimination, the availability of the continuing violation theory has most frequently been deemed to depend upon the continuing effect of the discrimination upon the plaintiff. However, some courts have also phrased the requirement in terms of the existence of a continuing relationship between plaintiff and defendant. See, e.g., American Finance System Inc. v. Harlow, 65 F.R.D. 94 (D.Md.1974). Because plaintiff in Evans had severed her relationship with United when she resigned in 1968, it is arguable that at the time she filed charges with the EEOC in 1972 she would not have been in a position to make a timely challenge to the "no-marriage" policy, had the policy still been in existence. However, even if such an additional bar to suit existed in Evans, it would have no effect on the claims of pensioners in the present case, as their relationship with defendants has been uninterrupted.

APPENDIX B

Pertinent Text of 42 USC § 1981

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, ...

Pertinent Text of Title VII

42 USC §2000e-2. Unlawful employment practices

(c) It shall be an unlawful employment practice for a labor organization --

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; ... .

. . . .

42 USC §2000e-5

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement

or hiring of employees with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable... .